BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

BRIEF.

A. The petitioners by clear, cogent and convincing testimony, proved the marriage of Jackson Barnett's parents and traced his life from his birth to his death. No witness on behalf of any other claimant saw, knew or heard of Jackson Barnett until after he was a grown man. A consideration of all the evidence compels the conclusion that petitioners are the nearest of kin of Jackson Barnett, deceased.

B. The evidence on behalf of the three prevailing groups of claimants is so contradictory and unconvincing as to be entirely insufficient to support a judgment in their behalf. The documentary evidence, as well as oral testimony, conclusively shows that the persons constituting neither of these three groups are heirs of the decedent, Jackson Barnett.

C. The contract between the three prevailing groups was against public policy and was also champertous. Furthermore, its approval by the Secretary of the Interior was procured by misrepresentation. Therefore, said contract was void; and its admission by the Court and its treatment as valid from the time of its filing wrought an injustice upon these petitioners, and many other claimants, and constitutes a reversible error, for which the cause should be remanded to the District Court for a trial de novo.

11 C. J., p. 253, Sec. 43b;
14 C. J. S., p. 369, Sec. 27;
Black's Law Dictionary;
Burns v. Burns, 137 Fed. 781.

II.

ARGUMENT.

A.

The Petitioners by Clear, Cogent and Convincing Testimony, Proved the Marriage of Jackson Barnett's Parents and Traced His Life From His Birth to His Death. No Witness on Behalf of Any Other Claimant Saw, Knew or Heard of Jackson Barnett Until After He Was a Grown Man. A Consideration of All the Evidence Compels the Conclusion That Petitioners Are the Nearest of Kin of Jackson Barnett, Deceased.

The testimony offered in support of the claim of Rosa Allen et al., begins with the marriage of the parents of Jackson Barnett in Claiborne County, Tennessee, which is on the Kentucky line, and traces him to Missouri, where he went as a boy with his father, and identifies him in Oklahoma. There was no attempt to contradict this testimony. The principal witnesses were reputable and entirely disinterested. They each referred to names, events and places by which they could have easily been discredited had they not testified truthfully.

It is proven that an Indian by the name of Jackson Barnett was born on Big Sycamore Creek, in Claiborne County, Tennessee, the only child of James Barnett and Margaret A. Condry, who were married in Claiborne County, Tennessee, in April, 1841. Their marriage is proven by a marriage license duly returned by a minister which is a part of the record in this cause, it being filed as Exhibit 7A to the deposition of E. H. McDaniel. So these claimants rest their case upon an actual proven marriage, which is quite in contrast to the vague and hazy relationship existing among those who are alleged to be the parents of Jackson Barnett by the other claimants.

In this marriage license the name was spelled "Barnard" instead of "Barnett," but numerous witnesses were introduced, particularly kinspeople, who testified that the name was sometimes spelled one way and sometimes another, which testimony was supported by documentary proof, such as a grant issued by the State of Tennessee to George Barnett, brother of James Barnett, in which the name was spelled both ways, and another grant of the State of Tennessee to Johnathan, brother of James Barnett. In these two documents, and others filed, the names were spelled "Barnett," "Barnard" and "Barnette" (Tr. Ev. Vol. 7, pp. 3035-3038).

Witnesses were introduced who actually knew James Barnett and his wife, Margaret A. Condry; knew the families to which they belonged; knew that they were Indians, and knew that James Barnett had a son Jackson Barnett, and knew, too, that about the time of the Civil War, his wife having died, James Barnett took his son Jackson and went to Missouri, and that neither of them ever came back to Tennessee. According to family history, Jim Barnett started with his son Jackson to Pleasant Hill, Missouri, where Jim Barnett's brother, Anderson, lived (Rec. p. 2980). According to family history Jim Barnett was killed before he got to their intended destination (Rec. p. 2980). Clint Barnett, now dead, went out to Missouri, and was heard to say that he had seen Jackson out there and tried to get him to come back (pp. 2981-2982).

The testimony relied upon by petitioners to prove that this particular Jackson Barnett of Oklahoma was the Jackson Barnett whose estate was in dispute in this case, was as follows:

The witness Nancy Seals testified that Clint Barnett had a letter from Jackson Barnett, who was at that time in the Indian territory. The witness saw the letter, did not

read it, but was told what was in it (Tr. Ev. Vol. 6, p. 2983).

The witness Nancy Davis, 66 years of age, who resided in Morristown, Tennessee, stated that her mother was a daughter of Anderson Barnett, brother of James Barnett. Her mother had been dead for about nine years. She had heard her mother talk about Jackson Barnett; that Jackson Barnett sent her mother the goods to make a dress when the witness was about 11 or 12 years old. Her mother had the dress made and wore it until it was worn out and saved the remnants, which were used in making a part of a quilt. One of the squares of this quilt was ripped out in the presence of counsel and filed as Exhibit 8A to deposition of witness. A photostatic copy of this material is filed and is a part of the record in this cause. The witness remembers her father bringing this cloth from the post office, and says that a letter from Jackson Barnett accompanied it (Tr. Ev. Vol. 7, pp. 3041, 3042, 3043, 3044, 3045).

This testimony was corroborated by that of Rosa Allen, sister of Nancy Davis (3047-3045), and also by the witness Henry Faddis, who worked for the father of Nancy Davis at the time in the operation of a registered government distillery.

In identifying the Jackson Barnett whose estate is involved in this cause as being the same as the person of that name who was born in Claiborne County, Tennessee, petitioners relied primarily upon the testimony of Alva Nevels, a man 52 years of age, who was a reputable farmer of Claiborne County, Tennessee. This witness owned his own farm which contained 82 acres. He was a married man, the father of seven children, one son a lawyer, one a doctor and another boy in college (Tr. Ev. Vol. 7, p. 3061). This witness also has a brother who was tax assessor of Claiborne County, Tennessee, and a brother who was a retired Army physician (page 3087).

This witness had no interest whatever in this case, as he did not claim to be of kin to Jackson Barnett. He says he went to Douglas County, Missouri, from Claiborne County on March 9, 1913; that he rented a farm from a man by the name of Henry Hartwell; that his crop was an absolute failure; that he sent his family back to Tennessee along in September and that he and three others by the name of Louis Wiser, Johnny Wiser and Charley Cain, the latter being now at Fort Charles, Virginia, went to Muskogee, Oklahoma, looking for work. While there they stayed with a sister of Louis Wiser and Johnny Wiser, whose name was Starks. He states that while he was there looking around town for work he met Jackson Barnett and talked with him several times as they loafed around. He says that Jackson Barnett told him that he was borne in Claiborne County, Tennessee, near Tazewell, which is the county seat; that Jackson Barnett asked him if he knew the names of people in Claiborne County by the name of Barnett; and that he told Jackson Barnett he knew the name of Jim Barnett, and Jackson said, "My father was named Jim Barnett." He said that Jackson Barnett told him, "I was raised in that county. I have got people back there by the name of Barnett"; that he told Jackson Barnett his name and that Jackson Barnett then stated that he knew a man by the name of Bishop Nevels, and that he told Jackson Barnett that Bishop Nevels was his half brother. The witness testified that Bishop Nevels was a preacher and died a very old man near Norwood, Missouri. It was because of his presence in Missouri that the witness had gone there. The witness stated that Jackson Barnett said he had lived in Thayer, Missouri, which is near the southern boundary. The witness testified that Jackson Barnett spoke English well (Tr. Ev. Vol. 7, p. 3076). The witness mentioned the names of Elbert Chadwell and Will Miller as other people he knew in Muskogee. The descrip-

tion which the witness gave of Jackson Barnett was apparently a likeness of the Jackson Barnett whose estate is involved in this case. There was no attempt to contradict this testimony.

Upon cross-examination the following questions and answers appear (Tr. Ev. Vol. 7, p. 3076):

> "Q. Did he (Jackson Barnett) refer to any of the occurrences in his young manhood and boyhood in Tennessee?
>
> A. He said that him and Bishop Nevels was at Clinch River once and saw two boys having a fight in the river, swimming, had their clothes off in the river swimming—two boys by the names of Barnetts, and Bishop was visiting his grandmother on Clinch River, he said, and I learned from Bishop that the people were there."

The only means by which it is sought to attack the credibility of this witness is by reason of his testimony upon cross-examination as follows:

> "Q. How large a town (referring to Muskogee)?
>
> A. A small town.
>
> Q. Four or five hundred?
>
> A. It was a small town about like Cumberland Gap, Tennessee.
>
> Q. How was it compared with this town here?
>
> A. It was a little better town than this town here. Not scattered as bad.
>
> Q. Do you think there was as many as seven or eight hundred people?
>
> A. I imagine there was.
>
> Q. How many stores were there?
>
> A. I wouldn't be able to tell you that. I didn't notice particularly."

At that time Muskogee, according to the census, was a city of about 25,000 population. Nevertheless, this is insufficient to discredit his testimony, particularly in the

absence of any interest on his part in the subject matter of this litigation and no reason being shown why he should have given special attention to the size of the town. Such a slight discrepancy in the testimony of the witness becomes insignificant when compared with the contradiction and confusion existing in the testimony introduced by the appellees.

A witness, who was entirely disinterested, by the name of Nancy Saylors, was introduced on behalf of other petitioners (Tr. Ev. Vol. 15, pp. 7076-7105). She was 64 years of age and a resident of Kentucky. She testified to a conversation between her husband and Jack Barnett in her home in Los Angeles about fifteen years ago. It appears from her testimony that her husband was dead and that she had moved back to Kentucky, and seeing an account of the death of Jackson Barnett in the Lexington Leader she was reminded of the conversation. She says, in substance, that her husband was seventeen years her senior (and was accordingly born about 1856), and that he attended school for eighteen months in Tennessee, which school is easily identified as Lincoln Memorial College, or its predecessor, which is in Claiborne County, the place where these petitioners insist that Jackson Barnett was born. While there her husband stayed at the home of Joe Henry Barnett.

In the year 1921 or 1922 the witness and her husband moved to Los Angeles. It was some time thereafter the witness, not attempting to give the date, though she thought it was "about 1922," that this conversation took place. They lived in Los Angeles for about ten years. Jackson Barnett moved to Los Angeles in May, 1923 (Tr. Ev. Vol. 1, p. 456).

Apparently one of the sons of the witness, while about his daily duties as an operator of a street car, became ac-

quainted with Jackson Barnett and in this way an acquaintance was formed between her husband and Barnett, who upon one occasion came to their home and ate the noonday meal with them. In the conversation concerning which the witness testifies, names and places were discussed in which Jackson Barnett was interested, indicating his former residence in Tennessee (Tr. Ev. Vol. 15, p. 7080).

The Siah Barnett Group filed an application for a passport made by Jackson Barnett in 1929 (Exhibit 4). Jackson Barnett stated in this application that he was born in the year 1842. This is strong corroboration of the fact that this is the Jackson Barnett who was born in Claiborne County, as the marriage license of his parents had been introduced, and it is proven that they were married in the year 1841. It was proven that Jackson was the only child, and here we have his own sworn statement that he was born in 1842. This is the strongest gleam of light which shines through the cloud of confusion produced by this record. It is also stated in this application that his father died in 1860, which is in exact accord with the tradition of the Barnett family of Tennessee (and the testimony of Peter Harvey, 87 years old in 1937, who says he knew James Barnett and son Jackson in Tennessee) and is in direct conflict with the idea that Siah Barnett was his father, because Siah Barnett died in the year 1897.

It is the further insistence of these claimants that the following facts corroborate their theory that Jackson Barnett was born in Tennessee, and that they, as his relatives, are entitled to his property.

In the first place, Jackson Barnett, according to all of the testimony, spoke English well. If he had been born and reared among the Indians of Oklahoma he probably wouldn't have talked English. This is particularly true, as the proof shows that he was not a man of strong men-

tality. The District Court found that Jackson "from his youth up had been an incompetent; that he was weak-minded and generally known as Crazy Jack" (Clk. Tr. p. 737). He learned to talk Creek as a matter of necessity, but there was no need of his learning to talk English.

That he talked English well is not contradicted. His wife, Annie Laura, with whom he lived for fourteen years, testified upon this point as follows:

"Q. Did he speak English?

A. He spoke well. He talked accurate English from the time I knew him. He wouldn't speak anything else after he was married. We never could get him to say a word in Creek (Tr. Ev. Vol. 1, p. 462).

Q. Jackson could not read nor write, could he?

A. Yes, a little bit. He read the headlines of the paper. He was always scribbling, always buying crayons, paper and pencils. I think he would have been an artist had he had an opportunity (Tr. Ev. Vol. 1, pp. 481, 482).

Q. Could he talk as good English as I can?

A. He spoke good English.

Q. That was in 1897?

A. Yes. He spoke good English.

Q. Then he could talk good English all his life?

A. Yes, and he did. After we were married he wouldn't speak anything but English" (Tr. Ev. Vol. 1, p. 483).

This same witness testifies:

"Q. Did Jackson during all the time you lived with him mention the fact that he had a sister by that name?

A. No. He always said he didn't have any relatives. When we first went to Henryetta to reside a number of those people came up and said they were related. Sometimes they were men and sometimes they were women, but he always turned his back on them and walked away and said he didn't have any relatives."

This is the attitude of one who was born elsewhere. If

he had been born and reared in Oklahoma with the hundreds of people there who now claim to be his relatives he would not likely have said that he did not have any relatives.

We find no instance in this record of anyone testifying either of their own knowledge or from what others told them that Jackson Barnett was ever seen in Oklahoma when he was a child. Apparently he was a young man before he was known there and at that time he was a roving, lost Indian, apparently living with such people who would take him in. He first appears upon the rolls in 1882.

While naturally the mode of living of the Indians makes it somewhat difficult to trace parentage, yet we believe it should be apparent to the Court that if Jackson Barnett was born, and lived from the time of his birth until the date of his death in Oklahoma, that his parentage could be traced with more certainty and with greater clearness than was done by the appellees. Particularly is this true when apparently some of the appellees (The Conner Group) had been engaged in the preparation of their case in Jackson Barnett's lifetime, as the proceeding instituted by them was filed in Oklahoma two days after Jackson Barnett died in California (Clk. Tr. Vol. 1, p. 35).

B.

The Evidence on Behalf of the Three Prevailing Groups of Claimants Is So Contradictory and Unconvincing as to Be Entirely Insufficient to Support Judgment in Their Behalf. The Documentary Evidence, as Well as Oral Testimony, Conclusively Shows That Neither of These Three Groups Are Heirs of the Decedent, Jackson Barnett.

The District Court and the Circuit Court of Appeals held that the persons constituting the Siah Barnett Group

designated as Group #I were the nearest of kin to the decedent on the paternal side; that the persons constituting the Conner Group of claimants designated as Group #II and the persons constituting the Stepney-Gouge Group of claimants designated as Group #III were the nearest of kin to the decedent on the maternal side.

The basis for the claim of the Siah Barnett Group is that Siah Barnett was the father of Jackson Barnett, and that his mother was Thesothle or Betty; that Thesothle died during or before the Civil War, and that Siah Barnett married a second time, his second wife being named Mary. By this second marriage Siah Barnett had five children: David, Eliza, Ellen, Hannah and Sissie. The persons constituting the Siah Barnett Group are the descendants of the children of Siah and Mary Barnett.

Group #II, or the Conner Group, claim that Thesothle or Betty was the mother of Jackson Barnett and that he was her only child, his father being unknown. They claim that Tusekiah Micco, known as old man Conner, was the father of Thesothle; that old man Conner had several other children, the brothers and sisters of Thesothle, and the members of this group are the descendants of the brothers and sisters of Thesothle or Betty.

Group #III, or the Stepney-Gouge Group, claim that Thesothle, also known as Betty, was the mother of Jackson Barnett, that his father was unknown. That Thesothle had three other sons, to wit, Haryarechee, otherwise known as Jim Lowe, Tecumseh and Joe; that Joe and Tecumseh died without issue, and that the members of this Group are the descendants of Haryarechee or Jim Lowe.

The Weakness of the Claim of the Siah Barnett Group.

All of the witnesses agree that Jackson Barnett was a full blood Indian, or part Indian and part white, and that

he had no negro blood. Practically all of the witnesses also testify that Siah Barnett was either a negro or at least one-half negro (Tr. Ev. Vol. 6, pp. 2723-2725; Tr. Ev. Vol. 6, pp. 2813-2834, 3787).

On December 8, 1869, Siah Barnett, on his own behalf, filed a claim with the United States Government for payment for property claimed to have been lost by reason of the claimant being loyal to the United States and abandoning his property during the Civil War (Curns Ex. #17, Clk. Tr. Vol. 1, pp. 415-417). This claim was made before Captain F. A. Field of the United States Army, Creek Agent. In the face of the claim Captain Field described Siah Barnett as "a half Creek, probably Creek and negro refugee." The claim shows that Siah Barnett was examined in English without the aid of an interpreter, and the supporting witnesses offered by him on the claim were Paro Bruner and William Bruner, **Freedmen.** This claim as thus prepared was signed and sworn to by Siah Barnett. On December 8, 1869, Siah Barnett also appeared as a supporting witness to the claims of two other persons for lost property. One of these was the claim of Timothy Barnett, Creek, as Administrator of the estate of Aleck Kernell (Curns Ex. 24). Siah Barnett, in making his supporting affidavit to this claim, described himself as **Freedman.** The other claim was that of Sukey Barnett, a Creek refugee, and the supporting affidavit of Siah Barnett describes him as "freedman, who testified in English" (Curns Ex. 23). So it appears that on this same day, December 8, 1869, Siah Barnett appeared before the Creek Agent, Captain F. A. Field, of the United States Army, three times in connection with claims for lost property. In his own claim he is described as half Creek, probably Creek and negro, but when he appears as a supporting witness to the claims of others he does not bother to show that he has any Creek blood at all, but merely describes himself as **"Freedman."**

In addition to these statements made by Siah Barnett himself as to his race the vast majority of the witnesses who testified on the question stated that Siah Barnett was, or appeared to be, part negro (Tr. Ev. Vol. 6, pp. 2738, 2833, 2887, 2930, 2940; Vol. 8, pp. 3787, 3800; Vol. 9, pp. 4063, 4211; Vol. 11, pp. 5188, 5286, 5294).

The census card of Trump Barnett, enrolled as a negro Freedman, recites that his father was Siah Barnett, who was identified as a slave of William Sullivan. Probably the only witness living at the time of the trial with personal knowledge of Siah Barnett, the ancestor of this group of claimants, was John Roberts, commonly referred to as John Cat. This witness testified that this Siah Barnett was the slave of William Sullivan, and that he knew him prior to the Civil War, living near Buzzard Hill (Tr. Ev. p. 1329).

It is clear that Siah Barnett, a negro, or at least half negro, could not have been the father of Jackson Barnett, a full blood Indian, or part Indian and part white, with no negro blood.

But even admitting for the purpose of argument that Siah Barnett was the father of Jackson Barnett, yet the persons constituting the Siah Barnett Group cannot inherit the estate of Jackson Barnett. Siah Barnett was by his own admission a **Freedman**. In other words, before 1866, he was a slave and could not enter into the marriage relation. Therefore, he could not have been married to Thesothle, the alleged mother of Jackson Barnett, and no heritable blood could exist between Jackson Barnett and Siah Barnett, or between Jackson Barnett and the heirs of Siah Barnett, as it is undisputed that Jackson Barnett was born between 1840 and 1852.

The documentary evidence does not support the claim that Siah Barnett was the father of Jackson Barnett. It

is undisputed in the proof that Siah Barnett, the ancestor of the persons constituting Group #I, died in 1897 (Tr. Vol. 6, p. 2767). Jackson Barnett filed an application for a passport on October 28, 1929 (William Fisher's Ex. No. 4, Tr. Ev. Vol. 6, p. 2755), in which he states that his father died in 1860.

The best documentary proof of relationship in Indian tribes is the tribal rolls prepared by the tribes themselves. Rolls were made of the Creek tribe for the years 1857, 1859, 1867, 1882, 1890 and 1895. The only Siah Barnett listed on the 1857 roll is the following family group: "No. 105, Siah Barnett, Eliza, Letty, James, Winey, Dave, Joshua, Thomas, Maria" (Curn's Ex. #7). Although a roll was made in the year 1859 no person is shown thereon by the name of Siah Barnett.

On the 1867 roll the nearest to Siah Barnett is the following family group: "No. 101, Cilas Barnett, Mary Barnett, David Barnett, Morriah Barnett, Ellen Barnett, Hannah Barnett, Katy" (Curn's Ex. #10).

The next or 1882 roll contains the following family group: "Tarya Barnett, Mary Barnett, David Barnett, Liza Barnett" (Curn's Ex. #12).

The 1890 roll contains the following family group: "Siah Barnett, Mary Barnett, David Barnett, Maysopha Barnett" (Curn's Ex. #14), and the 1895 roll contains the following family group: "Siah Barnett, Mary Barnett, David Barnett, Benjamin Davis, Pompey Davis" (Curn's Ex. #15).

No oral testimony was introduced to connect the Siah Barnett on the 1857 roll, or any member of the family thereon listed, with the Siah Barnett, ancestor of that group of claimants, and who died in 1897. The fact that no Siah Barnett appears upon the 1859 roll would indicate

that the 1857 Siah Barnett died between the making of the 1857 and the 1859 rolls. Several of the older witnesses also testified that there were two Siah Barnetts. Sarty Crowe, 84 years of age at the time he testified, stated that he knew Siah Barnett and Jim Barnett, who were sons of Tom Barnett, and testified as follows:

"Q. Did you know of any other Siah Barnett?
A. I know of a late Siah Barnett, and an old Siah Barnett.
Q. Which one was the late Siah Barnett; where did he live?
A. Around Bryant.
Q. Was he a brother of Jim?
A. Yes.
Q. Where did the old Siah Barnett live?
A. About six miles north of what is now Indianola.
Q. When did he die?
A. I don't know, but pretty close to Civil War.
Q. Before or after the Civil War?
A. Just before" (Tr. Ev. Vol. 11, p. 5050).

Another witness, Johnson Reed, who was 88 years old at the time he testified, knew Jim and Siah Barnett, the sons of Tom Barnett, and states that he also knew of another Siah Barnett, who died before the Civil War (Tr. Ev. Vol. 11, pp. 5102-5103).

The Siah Barnett Group seek to adopt the Cilas Barnett found on the 1867 roll, and the Tarya Barnett found on the 1882 roll, as being their ancestor, Siah Barnett, by another name. We are unable, however, to see any reason for this discrepancy in names, and no oral testimony has been introduced in so far as we are able to ascertain which explains this difference. On the other hand the testimony of William Fisher, a grandson of Siah Barnett, and one of the respondents herein, directly contradicts any such theory. At page 3735 of the transcript he testified:

"Q. How many names did Siah Barnett have, your grandfather?

A. Just one.

Q. Did you ever know him to be called Cilas Barnett?

A. No, sir."

And again at page 3737:

"Q. You say you never heard him called Cilas Barnett?

A. No, sir.

Q. Or Toryer (Tarya)?

A. No, sir."

The witness Annie Beams, a granddaughter of Siah Barnett, and one of the respondents herein, testified as follows:

"Q. Did Siah Barnett have any other name than Siah?

A. No, sir; that is all the name.

Q. That is the only name you ever knew him by?

A. Yes, sir.

Q. He was never known as Cilas Barnett?

A. No, sir.

Q. Toryer (Tarya) Barnett?

A. No, sir" (Tr. Ev. Vol. 8, p. 3714).

So the first time that Siah Barnett, ancestor of respondents, or his family group appears upon the rolls of the Creek Nation was in 1890. This is consistent with the idea that Siah Barnett before the Civil War was a slave, at least one-half negro; could not have been the father of Jackson Barnett, and, even if he were, could not have been the legitimate father so as to inherit from decedent. It has been noted, too, that Jackson Barnett does not appear upon any roll with Siah Barnett or his family group.

Culminating all this documentary and oral testimony is the action of the family of Siah and Mary Barnett in disclaiming any relation to Jackson Barnett when action was

taken upon the loyal Creek claim filed by Siah Barnett. As heretofore stated, this claim was filed on December 8, 1869, by Siah Barnett, who was then living. It was filed pursuant to Article 4 of the Treaty of June 14, 1866, with the Creek Indians, providing as follows:

> "A census of the Creeks shall be taken by the Agent of the United States for said Nation under the direction of the Secretary of the Interior and a roll of the names of all soldiers that enlisted in the Federal Army, Loyal Refugees, Indians and Freedman be made by him. The Superintendent of Indian Affairs for the southern Superintendency and the Agent of the United States for the Creek Nation shall proceed to investigate and determine from the said roll the amounts due the respective refugee Indians and shall transmit to the Commissioner of Indian Affairs for his approval, and that of the Secretary of the Interior, their awards, together with the reasons therefor."

An award was made upon this claim in the amount of $460. No funds were available for payment of the claim until an appropriation was made by Congress by Act approved March 1, 1901. By this time Siah Barnett had died and payment of the claim was made to the widow and heirs of Siah Barnett. Mary Barnett, the widow of Siah Barnett, made oath that she was his surviving widow, that he died in 1897 and left the following heirs: Mary Barnett, affiant, Dave Barnett, Pompey West, Jim Fisher, Sevin Fisher, William Fisher, Maria Fisher, Louis Fisher, Willie McQueen, Charity Grayson, George Walker and Joe Bird (Clk. Tr. pp. 415, 417). So Mary Barnett, the widow of Siah Barnett, swore that Jackson Barnett was not a son of Siah Barnett, and the heirs of Siah Barnett, by accepting the benefits of said award to the exclusion of Jackson Barnett, are estopped now to claim any benefits from the estate of Jackson Barnett.

THE WEAKNESS OF THE CLAIM OF THE CONNER GROUP.

This group of claimants, as heretofore stated, insist that Thesothle or Betty was the mother of Jackson Barnett; that she died during the Civil War, single and unmarried, and that the identity of the father of Jackson Barnett is unknown; that Thesothle was the daughter of Tusekiah Micco, otherwise known as Neddy and as old man Conner, who died leaving the following children: William Conner, Hannah Williams, Thomas Conner and Thesothle. These claimants are the descendants of William Conner, Hannah Williams and Thomas Conner (Clerk's Tr. p. 210 et seq.). It is to be remembered that all of the proof indicates, and the Court has found, that Jackson Barnett was born between 1840 and 1850. Jackson Barnett himself stated in his application for a passport that he was born in 1842. The testimony on behalf of the Conner Group shows clearly that Betty or Thesothle was the youngest child in the Conner family. (See the testimony of Rebecca J. Baker, Rec. pp. 10027, 13220; Nathan Williams, Rec. p. 13206, and Winey Hendrix, Rec. p. 7818.) It is also clear from the census cards (Conner's Exs. 4, 16 and 17) that the Conner child next older than Betty was born not earlier than 1850. Therefore, it is clear that the Betty who was the daughter of old man Conner had to be born after 1850. She could not possibly then have been the mother of Jackson Barnett, who was born probably in 1842, and at the latest in 1852.

The record also discloses that there were several Indian women in the vicinity by the name of Thesothle, so that in addition to the physical impossibility of Thesothle, the daughter of old man Conner, being the mother of Jackson Barnett, the proof is otherwise most indefinite as to which Thesothle, if either, was the mother of Jackson Barnett. (See claims of Curns-Gentry Group and Tiger Group.)

The Weakness of the Claim of the Stepney-Gouge Group.

This group also claim that Thesothle or Betty was the mother of Jackson Barnett, but claims that Thesothle had three other sons, two of whom died without issue, and the third known as Haryarechee, otherwise known as Jim Lowe, is the ancestor of claimants. The same argument applies to this group as applies to the Conner Group, since they joined the Conner Group in asking the Court to find as a fact that the mother of Jackson Barnett was the daughter of Tusekiah Micco, or old man Conner (Clerk's Tr. p. 645).

According to Conner's Exhibit 50 and Curns' Exhibit 53, relied upon by that group, the family consisted of Thesothle, Tecumseh, Haryarechee and Jackson. This places Haryarechee in age between Tecumseh and Jackson, making him younger than Tecumseh and older than Jackson, and it was pointed out in argument on the Conner Group that Jackson is admittedly as old as Betty, who is claimed to be his mother, and Haryarechee being older than Jackson, would be older than his mother. Therefore, Haryarechee was not the son of Thesothle, the daughter of old man Conner, who it is claimed is the mother of Jackson Barnett.

C.

The Contract Between the Three Prevailing Groups Was Against Public Policy, and Also Champertous. Furthermore, Its Approval by the Secretary of the Interior Was Procured by Misrepresentation. Therefore, Said Contract Was Void; and Its Admission by the Court and Its Treatment as Valid From the Time of Its Filing Wrought an Injustice Upon These Petitioners and Many Other Claimants, and Constitutes a Reversible Error, for Which the Cause Should Be Remanded to the District Court for a Trial De Novo.

The claims of relationship of each of the three groups to the deceased Jackson Barnett have heretofore been stated.

The scope of the evidence necessary to establish the claims of each of these groups, and the effect of their establishment upon the claims of the other groups, should be carefully considered.

All three groups agree on one fact, that Thesothle was the mother of Jackson, and such motherhood must be proven to entitle a decree for either group.

The first group to succeed must also prove that Jackson Barnett was the legitimate son of Siah Barnett, which would require proof that Siah and Thesothle were legally married, or of such facts as would justify the presumption of their marriage; that they are descendants of Siah, and that Jackson died without issue.

The second group to succeed must prove that they are descendants of "Old Man Conner"; that Old Man Conner was the father of Thesothle; and that Jackson died without a widow or issue, and without either whole or half brothers or sisters, or descendants of such brothers or sis-

ters. Under the claims of these two groups manifestly the vital question between them is whether Jackson Barnett was the legitimate son of Siah. If he was, then as between them the first group took the estate to the total exclusion of the second, because the first inherited through the paternal brothers and sisters of the deceased, while the second group claims through the maternal uncles and aunts of the deceased. If Siah Barnett was not the husband of Thesothle, as between these two groups, the second group would take the estate to the exclusion of the first. Their claims are just as distinct as if the dispute was over the identity of the Jackson Barnett who owned the estate.

The third group to succeed as to the whole estate must prove that they are descendants of Haryarechee; that Haryarechee was Jackson's brother, and that Jackson died leaving no full or half brother or sister, or descendants of a brother or sister other than the descendants of Haryarechee. The establishment of such facts would destroy all claims of Groups I and II. If they should prove the relationship claimed and the first group should also prove the relationship claimed by them, this group would take as one of the total number of the brothers and sisters of Jackson who left descendants.

Now, suppose the second and third groups had entered into an agreement or conspiracy to co-operate in proving that Jackson was the illegitimate son of Thesothle, and that he had no sister and Haryarechee was the only brother leaving descendants, in consideration of which the estate would be equally divided between the two groups. Manifestly, such an agreement would have been void, first, because under the principle announced by the Court of Appeals it would have been against public policy, and, second, it would have been champertous. By no possibility could the second and third groups both have an interest in the estate. Proof that would require a decree

for the third group would necessarily entirely exclude the second group. The descendants of a brother would take all as against descendants of uncles and aunts. The condition would have been exactly the same as if the third group had filed its claim, and the second had agreed to finance and otherwise co-operate in its prosecution in consideration of an interest in the estate. Such an arrangement would have been void, though the contracting parties were relatives, because of the illegality of the consideration. 11 C. J., p. 253, Sec. 43b; 14 C. J. S., p. 369, Sec. 27.

Terms of the Agreement Considered in the Light of Claims of the Parties and Condition of the Record.

Now let this agreement, which in fact is a combination or conspiracy against all other claimants, be considered with reference to the group composed of Rosa Allen, George Barnett and others, the group in whose behalf this brief and argument is filed.

There is nothing in common between this group and either of the combined groups except that Jackson Barnett was the owner of the estate in question. The Rosa Allen Group claims that Jackson was born in Claiborne County, Tennessee, of parents both of whom were part Indian, the father a Cherokee and the mother, whose name was Margaret Condry, a Creek; that their parents were married in Claiborne County, Tennessee, in 1841, as shown by a marriage license, which is on file in the record; that Jackson was born in 1842, his mother dying at his birth, or soon thereafter; that his father, James Barnett, never again married, but near the outbreak of the Civil War took his son, Jackson, to Missouri, and was there killed about 1860; and that Jackson lived with an uncle till about the close of the Civil War; and then went to the Indian Territory, and became a member of his mother's tribe, and his name was entered on the tribal roll in 1882, which is the first

time that Jackson Barnett's name appears on any of the Creek rolls.

If the claim of this group is true, then the claim of all of the combined groups that Jackson Barnett was the son of Thesothle is false, and neither of said groups has any legitimate claim whatever upon any part of Jackson's estate. Upon the theory that the claim of the Rosa Allen Group is true, it is easily understood how each of the combined groups framed a plausible story to substantiate their claims. Jackson Barnett, a youth 18 or 20 years of age, drifted into the Creek tribe from Missouri. He heard of Siah Barnett, and having the same name, he probably in a way attached himself to Siah. Whether or not Siah was ever married to Thesothle is not substantiated by this record. They probably co-habited, and doubtless were pretty closely associated. Thesothle certainly did not possess a good reputation for virtue because there is no claim upon the part of the combined groups that Haryarechee, the ancestor of the third group, and his brothers, Tecumseh and Joe, who died without issue, were legitimate. The first group necessarily claims that Siah and Thesothle were husband and wife. Otherwise, they could have no interest in the estate. It appears that Thesothle lived but a short time, and Siah subsequently, or possibly had theretofore, married Mary. Jackson was left drifting around in the tribe, and the omission of his name as a son of Siah in the claim against the Government certainly shows that he then had no connection with the family. But he was always treated as a full member of the tribe. When Jackson died and the contest arose over the estate, it was a simple matter for the children of Siah Barnett by his wife, Mary, to concoct the story that their father Siah was also the father of Jackson; and in hunting around for a mother they landed upon Thesothle. Group No. 2, probably taking the cue from Group No. 1, agreed with them that Thesothle

was the mother of Jackson, but denied that Thesothle and Siah were ever married; and consequently claimed that they were the nearest of kin to Jackson's mother. The third group naturally agreed that Thesothle was Jackson's mother; but claimed that she had other children besides Jackson, two of whom died without issue, and that they were descendants of the third. No persons living can possibly know better the truthfulness or falsity of these claims than the members of the three groups, and those intimately associated with them. As heretofore pointed out, the sustaining of the claims of Group 1 would be absolutely fatal to the claims of Group 2 and the sustaining of the claims of Group 2 would be fatal to the claim of Group 1. Furthermore if the claims of group 3 were sustained, those of Group 2 would be eliminated. But if it were established that Haryarechee was a son of Thesothle and that Jackson was also her son by Siah, and born in wedlock, then Group 3 would participate along with Group 1 in the division of the estate. However, the amount that would be received by Group 3, if such relationship were established, would be so small in comparison with the entire estate, which Group 3 would receive if Jackson, like Haryarechee, was illegitimate, the contention between Groups 1 and 3 was naturally very earnest. Under these conditions what was necessarily the effect of the agreement by which **all the members of the three groups united to prosecute all their claims as a unit.**

What does this agreement provide? In closing a lengthy preamble it recites that "The premises considered, the parties hereto believe that it will be to their best interests for them to unite in their best efforts to contest and defeat each of said other claims, and not to oppose each other, and in so doing they will not only protect their own legitimate interests, but will also promote the ends of justice and facilitate an early conclusion of this litigation," and then follows these covenants:

(1) "The persons constituting each of the groups of the parties hereto will co-operate with the persons constituting each of the other groups of the parties hereto in the prosecution of the claims of each group in this suit and in defending against all other claims now pending or that may hereafter be filed in said suit" (Clk. Tr. p. 487).

(2) "The persons constituting each of the groups of parties hereto shall continue to prosecute their claims, and each group shall bear and pay the expense by it incurred in establishing the relationship of its members to Jackson Barnett" (Clk. Tr. p. 487).

(3) Provides that the expenses theretofore accrued by either group were to be paid by such group (Clk. Tr. p. 487).

(4) Provides that the expenses of contesting and combating the claims of all parties to the contract should be borne and paid in the proportion of 50 per cent by Group 1 and 25 per cent by each of Groups 2 and 3. And a committee was created to determine the necessity or propriety of expenditures and to supervise the handling and expending of the funds (Clk. Tr. p. 487).

(5) "In the event that the court shall find that any person or persons in any group of the parties hereto is or are the heir or heirs of Jackson Barnett, then the estate of Jackson Barnett, or any part thereof, whether real, personal or mixed, so awarded to such person or persons shall be taken and deemed to have been awarded for and on behalf of the persons constituting the three groups of parties hereto"; and it is specified exactly how the division should be made (Clk. Tr. p. 489).

(6) "If any person belonging to either group be held to be entitled to any portion of the estate, the court is authorized and directed to enter a decree giving 50 per cent of the award to the first group, 25 per cent to the second and 25 per cent to the third group" (Clk. Tr. p. 490).

Special attention is called to the first and second provisions of the contract. In the first the persons constituting each group obligate themselves **to "Co-operate with the persons constituting each of the other groups of the parties hereto** IN THE PROSECUTION OF THE CLAIM OF EACH GROUP IN THIS SUIT **and in defending against all other claims now pending,"** etc. That is, the members of the first group agree to co-operate with the second group in proving that Siah Barnett was not the father of Jackson Barnett, or if his father, that Jackson was not born in wedlock. On the other hand, the second group agree to co-operate with the first group in proving that Siah Barnett and Thesothle were husband and wife, and that Jackson was their legitimate child; and the third group agree to co-operate with the first group in proving that Jackson was the legitimate child of Siah and Thesothle, and that they will also co-operate with the second group in proving that Jackson was not the legitimate child of Siah and Thesothle. In the second covenant, which was inserted to give some semblance of legitimacy to the contract, each group covenanted that its members would "continue to prosecute their claims." These two covenants when read together are perfectly absurd, and clearly show that the combination was nothing but a conspiracy to prepare a record which would induce a court to hold that the estate belonged to one of the groups, or to some member of one of them; and thereafter it was a matter of indifference which group, or member of a group, should be picked as a winner.

When the agreement was entered into the contest between the groups had become bitter; and they were destroying their respective claims. The status of the record at that time was such as to justify the inference that the respective groups knew of the falsity of the claims of the others, and that if their antagonism continued the result

would be the elimination of all of them from the contest; and they themselves being the persons who were more familiar than anyone else with the real facts regarding Jackson Barnett, they concluded that if they could become reconciled, and withhold from the court the truth about his parentage, they could, with the assistance of the government agents and the United States Attorney's office, combat successfully the claims of all other groups, and succeed in having the estate divided between them. As a result of this combination, no further effort was made to prove the truth about Jackson Barnett's parentage, but a fierce battle was continued against other claims.

In this connection the following language of the court of appeals is especially significant. In speaking of the muddled condition of the record at the time the contract was made and of the difficulty of reaching the truth about Jackson's relationship, if any, to the various claimants, the court said: "Some of the oral testimony and most of the documentary evidence which tended to support the claims of the persons constituting the other two groups had been introduced." This statement is enlightening, though not in the way the court interpreted it. In fact, each of those groups had introduced very damaging evidence, both oral and documentary, against the other groups before this agreement was entered into, **but they did not introduce evidence of such character after it was entered into.** If the agreement had been made in the beginning of the contest there is not the least likelihood that **any of such damaging evidence, either documentary or oral, would have been introduced.** The inherent tendency of the agreement was to suppress all evidence of that character. Consequently, this reservoir of information in which rested the most important evidence bearing upon the birth and life history of Jackson Barnett was hermetically sealed; and thereafter nothing escaped therefrom that had any material bearing upon that subject.

Analysis of the Opinion of the Court of Appeals.

We may accept the principles of law enunciated by the Court of Appeals relating to contracts which are against public policy because of their effect upon Court proceedings. In fact, it is doubtful whether they are more clearly or more accurately stated elsewhere than as given in its opinion. The Court upon that subject said:

> "A contract which **by its inherent tendency** is inimical to public welfare or inconsistent with good morals violates public policy and will not be enforced, either directly or indirectly. **The validity of a contract in point of being against public policy must be measured by its inherent tendency, not the good faith of the contracting parties or the manner in which they carried it out.** And the success or failure which attends the fulfillment of a contract tainted with trespass upon public policy is without moment. This comprehensive doctrine is of such long standing and wide familiarity that it cannot be necessary to review the cases without number in which a great variety of contracts have been uniformly overturned.
>
> "It is equally well settled that an agreement relating to a suit or proceeding in court **which invites or promotes interference with full and impartial justice therein violates public policy and will not be enforced in any manner, though no actual corruption is involved**" (122 Fed. [2d], pp. 777, 784).

And the Court cites and states the facts and holdings in a number of cases in support of those principles.

Now let us compare with that statement of the law governing the case the grounds upon which the Court maintained the validity of this contract.

After stating the difficulties in ascertaining the true facts with reference to the relatives of Jackson Barnett, and that much of the oral testimony and documentary evidence

on that subject had already been introduced, the Court said, in substance, that the persons constituting each of the three groups claimed to be the next of kin to deceased, but the evidence introduced and their investigation had convinced them that the members of the other groups were related to Jackson, but each group were yet contending that they were the **nearest** relatives; and they all agreed that the other forty-seven contestants were entitled to no part of the estate; or, "stated otherwise, they united in the belief that they all were related to the decedent and in the contention that the claims of all forty-seven groups of claimants were unfounded and without merit." The Court further said it was difficult and expensive to combat and defeat such a large number of claimants, and the labor and expense was too much for any one of the three groups; and that attorneys of widely-recognized ability and professional integrity representing the different groups testified that they participated in the negotiations leading up to the preparation and execution of the agreement; that the enormous labor and expense required to make the investigation and produce the evidence necessary to overcome the proof offered by certain claimants, notably Bertha Barnett, Henry Barnett and Mayetta Kingston, were the major factors which induced the parties to enter into the agreement, and that the suppression or withholding of any evidence was never suggested, discussed, or practiced; that they testified without qualification or condition that no pertinent evidence coming to their attention or knowledge had been concealed, or withheld, or excluded from the record; and that the contract expressly provided, among other things, that the members of each group would continue to prosecute their claims; and the approval of the Acting Secretary of the Interior, which was essential to the contract becoming binding upon the parties, was subject to the condition that all available evidence should be fully and fairly presented to the Court; that the agreement was

not conceived and preserved in secrecy; and that the Assistant United States Attorney attended some of the negotiations leading up to its execution.

In the first place, attention is specially called to the fact that in assuming these recitals to be facts and considering them as grounds for affirming the decree of the trial Court, the Court of Appeals disregarded the principles which it had so clearly and forcibly stated as being determinative of the validity of a contract of this nature, to wit: **"The validity of a contract in point of being against public policy must be measured by its inherent tendency, not the good faith of the contracting parties or the manner in which they carried it out."** It was not for the Court to consider the inducements which brought about the contract **except as an incident in determining its inherent tendency.** And certainly consideration should not have been given to the ability and reputation for integrity of the counsel giving testimony as to how they had proceeded under the contract, as its validity **must be determined solely from its inherent tendency.** The general principle that contracts of this nature are against public policy is based upon the obvious fact that it is inimical to the public welfare to permit human nature to be subjected to the temptation of making an improper use of such combinations and agreements; that while a set of gentlemen may be of the finest kind of reputation and may possess unblemished integrity and may make the utmost endeavor to act with entire fairness, yet a contract conceived, formulated and carried out by them, **if its inherent tendency is to subvert the ends of justice, will be declared void.** To hold otherwise would require each case, regardless of the inherent nature of the contract involved, to be determined upon its own extrinsic facts; what, however, one's reputation for integrity may be, it can never be known what effect strong personal interest may have upon his conduct.

The insistence that it was expensive to overcome the proof introduced in support of other claimants is certainly entitled to no consideration. Apparently the other groups were not composed of as large numbers as were these three, and each had financed the prosecution of its own claim. Why should either of these groups be exempted from incurring a like burden? Suppose a large number of competing groups had joined together and raised a large fund to combat the claims of these three groups either in combination or separately; and had stipulated that regardless of the merits of the respective claims of the groups, if either individual connected with either of them should prevail, they would divide recovery between them; can it be believed that either of the Courts below would have sustained such a stipulation?

The fact that there was no secrecy about the contract is not in its favor. It had to be approved by the Secretary of the Interior, and consequently its secrecy could not be maintained. Recent experiences have demonstrated that open, vigorous propaganda is a very effective weapon; and the terror inspired by the activities of these groups, and of the agents working on their behalf, all of which resulted from this combination, was far more effective than the agreement could have possibly been if its existence had been kept secret.

Nor is the fact that the contract was approved by the Secretary of the Interior entitled here to the least consideration in determining whether the contract was against public policy. This is demonstrated from the advice which was given him by the solicitor of the Interior Department in a communication recommending the approval of the contract in the following language quoted from an opinion received from the Attorney-General: "It has been suggested that the contract may be against public policy, but it is not entirely clear that this is true. The United States

Attorney in charge of the litigation has stated his approval of the contract and has also discussed the matter with the United States District Judge. The latter has indicated his view that the contract probably 'would not be against public policy.' Considering all the circumstances, and since the arrangement proposed is not a secret one and is subject to approval by several Courts, it would appear that you are under no compulsion to withhold your approval of said agreement because of a mere doubt. The parties are entitled to a presumption of legality and ought to be accorded their day in court upon this issue, if raised by an interested party" (Clk. Tr. pp. 497-498). Manifestly the Attorney-General had a most serious doubt about the validity of the contract; and suggested rather than advised its approval in order that the Courts might have an opportunity to pass upon it. Furthermore, if the statement of the trial Judge is true he had in fact expressed no opinion about its validity; and the information given by the United States Attorney to the Attorney-General was false.

Another ground upon which the Court of Appeals held the contract valid was that it partook of the nature of a family settlement; and a number of cases are cited in which it was held that the Courts look with favor upon the voluntary adjustments of conflicting claims by family settlements. And an effort was made by the parties to camouflage the contract by the pretense that it was a family settlement. The very first words of the instrument are: "This agreement, in the nature of and intended as a family settlement is made and entered into" (Rec. p. 480). In fact, the agreement is in no respect a family settlement; and no authority can be found which can justify its construction as such. In **Black's Law Dictionary**, under the word "Family," "family settlement" is said to be "a term of practically the same signification as 'family arrangement' "; and "family arrangement" is de-

fined: "A term denoting an agreement between a father and his children, or between the heirs of a deceased father, to dispose of property, or to partition it in a different manner than that which would result if the law alone directed it, or to divide up property without administration. In these cases, frequently, the mere relation of the parties will give effect to bargains otherwise without adequate consideration." The Court cites the case of **Burns v. Burns**, 137 Fed. 781, as bearing upon this question, but that case involved the disposition by will of a person's estate to two brothers; and the rights involved were those of the children of the deceased, and of the two brothers and their descendants. And in an examination of **Words and Phrases** no case will be found which suggests that the principle invoked extends beyond the limits of an immediate family.

If there had been no claimants other than these three groups, with some reason it could be insisted that **the paragraphs of the agreement which relate to the distribution of the estate** partake of the nature of a family settlement. But here are fifty groups of claimants. Three of them base their claims upon the alleged fact that Thesothle was Jackson's mother. Many, if not nearly all, of the other forty-seven groups deny that this woman was the mother of the Jackson Barnett who was the owner of the estate in question; and each advances a claim wholly separate and distinct from all of the other groups. One group claims to be direct descendants of Jackson, and it is immaterial to them who his mother was. Now, what right have the three groups who agree upon his maternal ancestor to get into a huddle, and, using a contingent division of the property, which has not yet been adjudged to belong to either of them, as a consideration for a contract, the very object of which is to combat the claims of all other parties for the property, and to withhold from the

court all evidence in the possession of either of them which would militate against the claims of either of the others? Such was bound to have been the purpose, as well as the effect, of the contract; for how else could they "co-operate"? If the second or third group had evidence that Siah Barnett was not the father of Jackson, could they "co-operate" with the first group by presenting it to the court? And can it be believed that any member of either group did not thoroughly understand that thereafter he was to reveal nothing that would be injurious to either group, but was to do all that he reasonably could to assist in maintaining any claim advanced by either group? In fact, the second covenant, that each group would continue to prosecute their claim, is in accord with this conception of the contract. Necessarily, if either group thereafter had failed to further prosecute its claim, it would not have given the other two groups an opportunity to co-operate with it, nor would it to that extent have been co-operating with them. The two covenants, when read together, mean that each group would present all evidence favorable to itself or to either of the other two groups, but would produce no evidence unfavorable to either group; and, further, that all would unite in an attack upon each of the other groups.

Even if it could be held that this contract is of the nature of a family settlement as between the parties thereto, yet no court has ever held that even a family settlement which reaches out beyond the family, and unfavorably affects the rights of other parties in a litigation then pending, is valid as to such parties.

Before entering upon a discussion of the validity of the agreement between the three groups, the Court made the following statement with reference to the conclusion which it had reached:

"There were many sharp inconsistencies and irrec-

> concilable conflicts in the evidence, but they were for the determination of the trial court. It may be said in summary that a painstaking review of the voluminous record convinces us that, despite the quantum of countervailing evidence, the determinative findings of the Court are adequately supported by substantial evidence, implemented by the stipulation referred to, and are not clearly erroneous, due regard being given to the opportunity of the trial court to judge of the credibility of the witnesses and the weight to be given to their testimony" (122 Fed. [2d], pp. 777, 782).

And in closing its opinion, after stating that the Court was not to be understood as approving all of the statements, comments and criticisms coming from the Court, or the excessive interference with the attorneys in the examination of the witnesses, the Court said in conclusion:

> "We think the Court reached the right conclusion in the end; another long and expensive trial, without the incidents of which complaint is made, would in all probability conclude with like findings of fact and judgment; and the ends of justice would therefore not be furthered with a reasonable dispatch by ordering a new trial" (122 Fed. [2d], pp. 777, 789).

From these statements of the Court it is evident that there was no certainty in the Court's mind that a correct conclusion had been reached; and the use of the word "probability" clearly justifies the inference that the Court thought it not "improbable" that in a second trial a different disposition of the estate of Jackson Barnett would be made.

The Court correctly stated that in order to affirm the judgment it was necessary that the evidence be "implemented," that is, "completed" or "supplemented," by the agreement. With it absent no record could possibly be made upon which the disposition of the property made by the Court could be upheld. As each of the three groups

would have to depend for recovery upon the merits of their own claim, the evidence introduced to establish their merits would in all probability show that the merits of neither of them would be so clearly proven as to justify a decree in their favor.

The conduct of the trial Judge and the unusual activities of the United States Attorney's office, all favorable to the combined groups, and antagonistic towards all other groups, were pressed upon the Court of Appeals. While that Court took the view that proper steps had not been taken to secure the assignment of another Judge to try the case, yet they did recognize the fact that during the proceedings things were done of which they could not approve. And we respectfully submit that it is obvious from the record that no claimant received a fair and impartial hearing, the combined groups being unduly favored, while due consideration was not given to the claims of other groups. However, we will not lengthen this brief and argument with a recital of the incidents which indicate such partiality.

For the foregoing reasons the decree of the Trial Court and of the Court of Appeals should be reversed, and the cause be remanded to the District Court with direction that a decree be entered in favor of these petitioners, or that a new trial be had.

Respectfully submitted,

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JAN 26 1942

In the Supreme Court

of the United States

No. 825—October Term, 1941.

DORA BRADY AND LUCINDA WATKINS,

Petitioners,

vs.

ANNIE BEASLEY, [illegible]

Respondent.

ANSWER BRIEF TO THE PETITION FOR CERTIORARI.

W. T. ANGLIN,
ALFRED STEVENSON,
DICK JONES,
LEON C. PHILLIPS,
E. W. SMITH,
CHARLES A. MOSER,
FRANCIS STEWART,
JOSEPH C. STONE,

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By various Acts of Congress the allotment of Jackson Barnett is restricted against alienation, and the royalties accrued therefrom, which are held by the Secretary of the Interior, under his supervision and control, are likewise restricted. It was therefore necessary that the Secretary of the Interior and the several county courts of Oklahoma which approved the contract, should approve the instrument..... 22

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In the Supreme Court of the United States

No. 829—October Term, 1941.

DORA BRADY AND LUCINDA WATASHE, *Petitioners,*

vs.

ANNIE BEAMS, *ET AL., Respondents.*

ANSWER BRIEF TO THE PETITION FOR WRIT OF CERTIORARI.

Statement.

Nothing whatever has been served upon respondents except a printed copy of the petition for writ of certiorari and the brief attached thereto, consisting as a whole of 145 pages. For convenience we hereinafter sometimes refer to the petition and the attached brief as "the petition".

We respectfully challenge the sufficiency of the petition, together with its supporting brief, and ask for its dismissal or, in the alternative, for a denial of the writ, for failure to comply with the applicable rules of this Honorable Court, particularly Rule 38, and for failure to show cause for the issuance of the writ. As one ground for dismissal of the petition or, in the alternative, denial of the writ, we contend that petitioners have failed to meet the requirements of Section 2 of Rule 38, which provides as follows:

> "*2.* The petition shall contain only a summary and short statement of the matter involved and the rea-

sons relied on for the allowance of the writ. A supporting brief may be included in the petition, but whether so included or presented separately, it must be direct, concise and in conformity with Rules 26 and 27. A failure to comply with these requirements will be a sufficient reason for denying the petition. * * *"

As further ground for dismissal of the petition or denial of the writ we invoke Section 3 of Rule 38, which provides:

"*3.* Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, shall be served by the petitioner on counsel for the respondent within ten days after the filing, and due proof of service shall be filed with the clerk. * * *"

And as further ground for dismissal of the petition or denial of the writ we show that the petition is fatally incomplete, in that it does not cover the subject-matters necessary for consideration in such instances. Whilst proceeding upon the theory that certiorari should be granted for want of a fair trial in the district court, the petitioners wholly, or almost entirely, fail to present the material parts of the vast record which shows, as we contend, that they had a fair trial, and that frauds and misconduct upon the part of and in behalf of the petitioners and their witnesses, and misconduct upon the part of one or more of their counsel, brought upon the petitioners the criticisms of the trial judge, about which complaint is here made. Petitioners merely present an abstract of their own evidence in chief, and invite the respondents to present the vast record of the proceedings upon which the judgment was entered.

The petition, together with the brief attached, is a mixture of some truth, many mis-statements of fact, and

counsel's erroneous conclusions both with respect to the facts and the law, so compounded and confused that it is not reasonably possible to separate the parts thereof.

Petitioners make respondents' three-volume brief filed in the Circuit Court of Appeals, Vol. II of their Appendix. Vol. I of respondents' brief contains a statement of the case, the findings and conclusions of the trial court, an abstract of the evidence introduced upon behalf of the respondents, the prevailing parties, and argument of counsel, with authorities, as to the effect of the evidence offered by respondents. Vol. II contains the respondents' answer brief to the several briefs filed upon behalf of the appellants in the Circuit Court of Appeals. The claims of Dora Brady and Lucinda Watashe are discussed in Vol. II commencing at page 153. Vol. III consists of respondents' brief with respect to the alleged disqualification of the trial judge, the alleged unfairness of the trial court, and the Family Settlement Agreement.

In the event this Court desires to examine said three volumes of respondents' brief in the Circuit Court of Appeals, or any part thereof, we respectfully call attention to the index of said three volumes, which so far as appears applicable, is as follows (the authorities cited are here omitted):

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THE ALLEGED DISQUALIFICATION OF THE TRIAL JUDGE.

Upon the filing of an affidavit to disqualify the trial judge upon the ground of personal bias and prejudice, under the provisions of Sec. 21 of the Judicial Code (28 USCA, Sec. 25), it is the duty of the trial judge to pass upon the timeliness and legal sufficiency of such affidavit. If the affi-

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(e) The parties to the Family Settlement Agreement became, as of the date of their contract, June 30 1936, and long before the commencement of the trial, owners in common of all the right, title and interest of the contracting parties in and to the estate here involved. They could then, as such owners in common, do anything for the protection of the common title which the courts ordinarily permit owners in common to do. The contract did not require that any party thereto should do or refrain from doing anything out of ordinary and lawful course when a common title is attacked.. 241

(f) The authorities cited by appellants in support of their contention that the settlement agreement is against public policy are not in point; they are wholly inapplicable. The Family Settlement Agreement is not against public policy. There is nothing in the contract which even tends to invite suppression of evidence. There is nothing in the contract which contemplates or suggests the use of unlawful means. The evidence as to the manner in which the appellees performed their respective duties under the agreement is all to the effect that suppression of evidence was never contemplated; that in fact and in truth the parties to the contract offered all available evidence, as required by the order of approval by the Secretary of the Interior.....248"

The subject-matter of these three volumes, as appears by mere reference to the part of the index above set forth, shows that petitioners have failed to present anything what-

ever covering the vast field embraced in respondents' brief. Petitioners pass over, as if of no importance, the extended evidence, documentary and oral, upon behalf of the three successful groups, abstracted and discussed in Vol. I under the head "The clear weight of the evidence documentary and oral, sustains the findings of the trial court in favor of the appellees and against all other claimants."

Thus petitioners attempt to show, merely from the proceedings when they were putting on their evidence in chief, that the trial judge was disqualified, that the trial court did not give the petitioners a fair trial, and that the Family Settlement Agreement is void. For important parts of the evidence introduced by the three successful groups, see the many exhibits introduced upon behalf of respondents and the testimony of the witnesses upon their behalf. All these matters are fully abstracted and discussed in Vol. I of respondents' brief filed in the Circuit Court of Appeals.

A correct understanding of the history of the case and the issues of fact and of law heard and determined, may be obtained from the trial court's findings of fact and conclusions of law (Clk. Tr. Vol. 2, pp. 1132-1181). A more concise history is contained in the decision of the Honorable Circuit Court of Appeals for the Tenth Circuit, reported as *Scott* v. *Beams, et al.*, 122 F. (2d) 777.

We here attempt to avoid discussion of the merits, except incidentally and only in so far as we deem it necessary to show that the writ should not issue.

Petitioners' Mis-statements of Fact.

We contend that the petition should be dismissed, amongst other reasons, because of its many mis-statements with respect to the vital facts of the record. There is an utter want of any true picture of the proceedings in the

trial court. These false statements are so numerous as to preclude a complete listing here. A considerable number are so manifest that they require no particular mention. Others are so flagrant, misleading, and cleverly done that they seem to require special attention.

Petitioners say, referring to the question of the identity of the Jackson Barnett whose estate is here involved, "Only one controlling issue of fact was presented and as to said issue there was no conflict in the evidence." In effect this is repeated often in the petition and brief. This statement is wholly false. A large part of the record made by respondents and claimants other than these petitioners was to establish the fact that the Jackson Barnett whose estate is here involved was the Jackson Barnett whose name appears on the Tuckabatchee Creek Indian tribal rolls introduced in the record, whose father was Siah Barnett, whose mother was Thlesothle, who was enrolled by the Commission to the Five Civilized Tribes upon the final roll opposite No. 4524, as a member of said Tuckabatchee Town, and who died in 1934. In the other hand, as will more particularly appear hereinafter, the Jackson Barnett through whom petitioners claim was a member of Hickory Ground Town of the Creek Nation and died prior to the final enrolment of and allotment to the members of said Creek tribe, as shown by the enrolment record in evidence.

Instead of want of conflict as to the identity of the allottee Jackson Barnett, as claimed by petitioners, there was the sharpest conflict upon the question.

At page 5 of the petition it is alleged, with respect to the trial judge and the family settlement agreement, that "Honorable Robert L. Williams actively assumed the lead in inducing the Attorney General and the Secretary of the Interior Department of the United States to approve and

carry out the said compromise agreement or family settlement * * *." There is nothing whatever in the record to support this charge. It is scandalous and contemptuous to the extent that the petitioners should not be heard in this Court.

When the family settlement agreement was before the Secretary of the Interior upon application for its approval, the Secretary referred the matter to the Attorney General for an opinion. The Attorney General, desiring to avoid even the appearance of contempt of the trial court, requested that the United States District Attorney for the Eastern District of Oklahoma ascertain whether or not the trial judge would deem the approval of the contract by the Secretary to be an act of contempt. Thereupon the Assistant United States District Attorney informed the trial judge that some of the full-blood Indians had entered into a family settlement agreement, which was under consideration by the Secretary of the Interior and the Attorney General, and inquired as to whether or not the trial judge would deem approval by the Secretary such invasion of the court's authority as to constitute contempt. The judge did not then know who the parties to the contract were, nor its terms. He never knew the terms of the contract, or who the parties thereto were, until the last day of the trial. The judge's response to the inquiry was merely this: He advised that he would not pass upon the contract unless and until it was presented to him in court; that he would have nothing to do with the contract until it reached him as a judge, but that so far as the approval of the agreement by the Secretary was concerned, he would not treat action upon the contract by the Secretary as contemptuous.

The testimony of the Assistant United States Attorney (Tr., p. 8532) is in part as follows:

"The Court: Now, Mr. Miller, didn't I tell you when you came in there that I wasn't going to have anything to do with that matter until it got to me as a judge?

A. Yes, sir.

The Court: And wouldn't express any opinion but that so far as I was concerned I wouldn't treat it as a matter of contempt?

A. Yes, sir, that is true."

The trial upon the merits closed June 23, 1938, with reservation for further hearing as to the family settlement agreement. Commencing February 27, 1939, the evidence and argument was heard with reference to the contract of settlement. The following colloquy occurred (Tr., p. 8508):

"The Court: They asked whether I would take that as contempt in settling this case. I told them I wouldn't but I wouldn't pass on it.

Mr. Pinson: Your honor never saw this contract?

The Court: No, I didn't know what it was. I never saw that contract until it was introduced in evidence.

Mr. Pinson: And I doubt if you have studied it.

The Court: I have never studied it. I have never passed on the merits of the contract."

This is the whole truth about the alleged connection of the judge with the contract, except that when its validity was challenged he requested the Circuit Court of Appeals to assign another judge to pass upon the contract, which request was refused.

At pages 4 and 5 of the petition it is alleged that the respondents "wrongfully induced" the Assistant United States District Attorney, without the knowledge of the petitioners, to contact the trial judge, the Solicitor for the

Secretary of the Interior, and the Secretary of the Interior, to procure approval of the family settlement agreement, and that said Assistant United States Attorney, with the "concurrence" of the trial judge, "secretly, wrongfully, improperly and collusively" took the lead in securing the approval of the contract, contrary to the duties of his official position. In effect the same allegations are repeated in the brief at pages 54, 55, 74, 75, 109, 110, 118. These statements are wholly false, except perhaps the statement that the petitioners then had no knowledge of the contract, for in fact they were not then claimants to the estate. The contract was made June 30, 1936. It was approved, as required by law in such instances, by the County Court of Muskogee County, Oklahoma, which court had jurisdiction of the settlement of the estate of Jackson Barnett, March 8, 1937, and was approved by the Secretary of the Interior September 2, 1937. The trial commenced March 23, 1937. The petitioner Dora Brady intervened in the action July 12, 1937. Lucinda Watashe intervened February 11, 1937.

That the petition and brief tend to mislead rather than enlighten is abundantly witnessed: For instance, by the claim that no notice of the proceedings relating to the contract was given petitioners, when in fact they were not claimants. There was no "concurrence" of the trial judge in the matter of the contract. There was no solicitation by respondents for the aid of the United States Attorney's office in the matter of the approval of the contract. The action in the office of the United States District Attorney was merely in furtherance of proper discharge of duties in the case of restricted Indians, for whom the United States had appeared as a litigant in the case.

There are various other material mis-statements of fact, hereinafter cited at appropriate places.

The Charges of Bias and Prejudice Upon the Part of the Trial Judge, and the Alleged Failure of the Court to Grant a Fair Trial.

These charges rest upon two false assumptions, to-wit: *(1)* It is erroneously assumed that the appearance of the United States upon behalf of restricted Indians was wrongful, and that this appearance by the United States improperly influenced the trial judge in favor of the parties to the settlement agreement, against all other claimants, and *(2)* It is further erroneously assumed that said agreement is against public policy, and that on account of the family contract the trial judge was biased in favor of the parties to the contract and prejudiced against all other claimants.

The record shows that the United States appeared impartially upon behalf of all the restricted Indians until the government was fully advised as to the true facts relating to the heirship, and until many depositions had been taken. It was then that the Assistant United States Attorney, in the course of his ordinary duty, recommended the approval of the family settlement agreement.

The Circumstances in Which the Matters Complained About Arose.

A large fortune was involved. The case was widely advertised. There were more than forty groups of claimants, each asserting title to the whole of the estate. The claimants numbered nearly one thousand. They were widely scattered, all the way from California to eastern parts of Tennessee and Kentucky. Many of the claims were manifestly wholly fabricated. From the first of the trial, and throughout, perjury as to many of the claims abounded beyond any precedent known to us. And there was much subornation of perjury. From time to time witnesses returned to the

stand to retract their former false evidence. Some of the lawyers participating in the case were provokingly uninformed with respect to the history of the matters under consideration and with respect to the laws governing the Creek Tribe of Indians, to which Jackson Barnett belonged. After repeated warnings some of the attorneys, including counsel for petitioners, persisted in leading their witnesses at the vital points. Often disrespect for the court was shown. There were frequent unfounded and bitter attacks upon high placed and honorable representatives of the United States. There was abundant evidence of gross frauds by various claimants to procure and corrupt their witnesses. The record as to the losing claimants, though not all bad, considered as a whole was so intolerable that the trial judge was provoked beyond quiet endurance.

The Trial Judge.

It is a matter of common knowledge that the trial judge has had a long, honorable and useful career in the State of Oklahoma. He was first Chief Justice of the state, then its Governor for four years. Thereafter for many years he was United States District Judge for the Eastern District of Oklahoma, and was then elevated to the Circuit Court of Appeals for the Tenth Circuit. Now in retirement, he was assigned to preside at the trial of this case. He often participates in the work of the Circuit Court. Repeatedly he has been referred to in the decisions of the Circuit Court of Appeals for the Tenth Circuit as experienced and very able in Indian matters of this sort. Probably he was assigned to this case because of his vast experience and ability in such matters. It seems that in effect he is charged with dishonesty. We respectfully submit that these charges are intolerable.

(We find ourselves unable to follow the order of petitioners' brief. Respondents' brief, which follows, is intended to further show that the petitioners had a fair trial, free from bias or prejudice upon the part of the trial judge. In the brief we discuss incidentally the family settlement agreement and the proceedings with respect thereto.)

The petitioners had a fair and impartial trial, free from bias or prejudice upon the part of the trial judge.

(1) ***Petitioners erroneously assume and charge that the appearance of the United States, together with the acts of its officers during the course of the trial, was wrongful and unauthorized by law, and that this improperly influenced the trial judge in favor of the respondents and against all other claimants.***

The United States had the capacity to prosecute this suit upon behalf of restricted Indians, to conserve their restricted property, and to assist in placing the same in the hands of the true owners. Its representation is neither incomplete nor inadequate to fully protect the real owners of the property. There can be no more complete representation than that on the part of the United States whilst acting on behalf of its dependents. This authority of the Government does not rest upon any convention, nor is it circumscribed by any rules which govern private relations. The source of the Government's representation in such cases is traced to the plenary power of Congress in legislating for the protection of the Indian wards of the Government. Neither the Government nor the courts recognize any limitations upon the Government's authority inconsistent with its full discharge of the national duty to the wards of the United States. The presence on the same side with the Government of other parties neither adds to nor detracts from the power of the government whenever the govern-

ment chooses to exercise its powers in such case. The restricted Indians themselves cannot successfully assume any attitude with respect to their restricted properties which would hinder the United States in its complete representation of the restricted Indians. The question as to whether or not the United States will exercise its vast powers in Indian matters is left, under the acts of Congress, to the discretion of the Executive Department, particularly the Secretary of the Interior, at whose instance the United States appeared in this case. The government, through its proper agencies, determines for itself, where restricted Indians are involved who war among themselves as to the ownership of the property, whether or not to appear in its representative capacity, and if appearing, whose cause the United States will espouse.

—*Heckman* v. *United States*, 224 U. S. 431, 56 L. ed. 820;

United States v. *Mid-Continent Petroleum Corp.* (10th Cir.), 67 F. (2d) 37;

Caesar v. *Burgess*, (10th Cir.), 103 F. (2d) 503.

See also the following cases, involving either parts or all of the properties of the Jackson Barnett, deceased, whose estate is here involved:

Barnett v. *United States* (9th Cir.), 82 F. (2d) 765;

United States v. *Mott* (10th Cir.), 37 F. (2d) 860;

United States v. *Mott* (D. C.), 33 F. (2d) 340;

Barnett v. *Equitable Trust Co.* (2nd Cir.), 34 F. (2d) 916, 918;

Barnett v. *Equitable Trust Co.*, 21 F. (2d) 325;

United States v. *Equitable Trust Co.*, 283 U. S. 738, 75 L. ed. 1379.

—Act of May 27, 1908 (35 Stat. 312);
Act of April 12, 1926 (44 St. L. 239);
Act of January 27, 1933 (47 St. L. 777).

The United States statutes above cited authorize the appearance of the United States and its representation of restricted Indians in the manner in which the government here appeared.

The power of the Government to represent restricted Indians and to preserve their properties necessarily carries with it the power of determination of the question as to which of the contending parties is entitled to the support of the Government. And when the Government, by its proper representatives, has so determined which of the claimants are entitled to the support of the United States, it necessarily follows that the Government has the right to sue upon behalf of those wards who are accepted by the Government as the true owners of the property in dispute.

Petitioners go entirely too far when they say that the trial judge was improperly influenced in his findings of fact, conclusions of law, and decree, by what the United States did in the ordinary course of proper exercise of its powers and duties in the representation of restricted Indians.

Likewise, they go too far and altogether beyond the bounds of propriety by proclaiming that the trial judge was unduly influenced in his judicial decision by the acts of the governmental agencies with respect to the approval of the Family Settlement Agreement. These governmental agencies for the purpose of the approval were the Secretary of the Interior, the Solicitor in his office, the Attorney General of the United States, the United States Attorney for the Eastern District of Oklahoma, the Superintendent for the Five Civilized Tribes, the County Court of Muskogee County, Oklahoma, which has jurisdiction of the settlement of

the estate of Jackson Barnett, deceased, subject, of course, to the right of this Court to determine the heirship, and the various other County Courts of Oklahoma which aproved the contract in the cases of the widely scattered minors and incompetents.

Petitioners who charge bias and prejudice upon the part of the trial judge erroneously contend that the United States is a mere ordinary interpleader, and say that it was incumbent upon the Government throughout the trial to remain disinterested and impartial.

Petitioners' theory as to what constitutes the alleged bias and prejudice is found in the following excerpt from their brief presented in the Circuit Court of Appeals and here filed as part of their Appendix, Vol. I:

> "Having so interpleaded herein for and on behalf of the United States as the guardian for all the restricted Indians, who claim to be heirs of the said decedent, Jackson Barnett, and for the protection of the rights of all such restricted Indian claimants in and to said estate of the decedent, which was held and controlled in the Interior Department of the United States, and the rights of the United States as the custodian of said property for the use and benefit of such restricted Indian claimants as the court might adjudge to be said heir, it follows that the said Assistant United States Attorney was without the right or authority to participate in negotiating, executing and presenting the so-called 'compromise agreement' or 'family settlement' in behalf of a part of the said restricted Indian claimants and to the prejudice of other restricted Indian claimants, and that the said Assistant United States Attorney had no right or authority to thereafter prepare and present to the court for approval findings of fact and conclusions of law in favor of said groups.
>
> * * * * * * *

"The court should hold in mind that *this is the culminating and deadly act of the attorneys for the United States, done in the name of the United States, and guardian and interpleader for the appellants, Dora Brady, et al.*, restricted Indian claimants herein, as well as for other restricted Indian claimants. *Frankly, it was a judicial stab in the back and was inflicted without notice,* as no copy of said requested findings of fact and conclusions of law were served on appellants, and appellants had no knowledge of the said requested findings and conclusions until the record herein on appeal was being prepared." (Italics ours.)

(2) *The Family Settlement Agreement is valid and did not tend to prejudice the trial court.*

The instrument provides *(1)* that each group should continue to prosecute its claim at its own expense; *(2)* that the three groups should share the expense of defending against all the other claimants; and *(3)* in the event the members of either group should be adjudged to be the heirs of Jackson Barnett, then the persons comprising the three groups should share the estate in the proportions specified in the contract.

A correct statement of the provisions of the contract, the contentions of the parties as to its meaning and effect, its manner of performance, and the court's findings and conclusions with respect thereto, are shown in the court's findings of fact and conclusions of law entered January 2, 1940 (Clk. Tr. Vol. 2, pp. 1132, 1171).

The approval of the instrument by the Secretary of the Interior is as follows:

"DEPARTMENT OF THE INTERIOR.
Office of the Secretary.
Sep-2, 1937.

"The foregoing agreement as of June 30, 1936, by and between certain persons (Seaborn Fisher, Nettie Conner Bear, Eliza Gouge, and other persons) composing three groups of claimants as heirs to the estate of Jackson Barnett, Creek Indian, roll No. 4254, deceased, is hereby approved without prejudice to the right of any claimant and subject to the condition that all the evidence available to the parties to the agreement shall be fully and fairly presented to the Federal Court and subject to the further condition that such approval shall not be construed as qualifying, removing or impairing in any way whatsoever the existing restrictions and jurisdiction of the Secretary of the Interior over any property belonging to the estate of Jackson Barnett, deceased. This approval shall not be construed as a recognition by the Department that the parties to the agreement, or any of them, are in fact the rightful heirs of Jackson Barnett."

(Signed by the Acting Secretary of the Interior.)

This instrument is Conner's Exhibit No. 73.

Only parties to a settlement agreement may avoid it by suit. Petitioners are strangers to the agreement and therefore have no standing in court to impeach its validity.

—C. J. S. p. 749, par. 30;

Hall Lumber Co. v. *Gustin* (Mich.), 20 N. W. 616, 619.

Compromises are favored by the courts; and the most favored of all compromises are contracts of family settlement.

—18 C. J. 887, Sec. 157;

18 C. J. 888, Sec. 158;

12 C. J. p. 322;

Pomeroy's Equity Jurisprudence, Third Edition, Vol. 2, p. 1500, par. 850;

Sango v. *Parks*, 44 Okl. 223, 143 Pac. 1158;

Kiefer Oil & Gas Co. v. *McDougal* (8th Cir.), 229 Fed. 934;

Williams v. *First Nat. Bank*, 216 U. S. 582, 44 L. ed. 625;

5 R. C. L. 880, "Compromise and Settlement";

Vinson v. *Cook*, 76 Okl. 46, 184 Pac. 97;

Burnes v. *Burnes*, 137 Fed. 781.

One claiming to be an heir may sell, assign and transfer his interest in an estate during or prior to administration and before a decree of distribution is rendered, and his assignee or grantee will "step into his shoes", and if the assignor or grantor is adjudged to be an heir, the assignee or grantee will receive distribution in his stead.

(This point is to meet the contention that as to some of the contracting parties the approved agreement effected the transfer of interest.)

—Sec. 1366, Okla. Stat. 1931;

18 C. J. 898;

24 C. J. 930;

Lusk v. *Green*, 114 Okl. 113, 245 Pac. 636;

Purdue v. *Purdue*, 81 S. W. 633;

Sloan v. *Moffatt*, 41 Iowa 271;

Sieve v. *Steinridge*, 1 S. W. 672;

Branch v. *Hanrick*, 70 Tex. 731, 8 S. W. 539.

The parties to the Family Settlement Agreement became, as of the date of their contract, June 30, 1936, and long before the commencement of the trial, owners in common of all the right, title and interest of the contracting

parties in and to the estate here involved. They could then, as such owners in common, do anything for the protection of the common title which the courts ordinarily permit owners in common to do. The contract did not require that any party thereto should do or refrain from doing anything out of ordinary and lawful course when a common title is attacked. The approval related back to date of settlement.

—*Anchor Oil Co.* v. *Gray*, 256 U. S. 519, 65 L. ed. 1070;

United States v. *Getzelman*, 89 F. (2d) 531.

The contract was a conveyance by the members of each group to the members of each of the other two groups, of all such right, title and interest as was held by such members in and to the Jackson Barnett estate, as was necessary to vest in each of the groups, and in the members thereof, the proportionate parts of said interest in the estate provided for in said contract.

By various Acts of Congress the allotment of Jackson Barnett is restricted against alienation, and the royalties accrued therefrom, which are held by the Secretary of the Interior, under his supervision and control, are likewise restricted. It was therefore necessary that the Secretary of the Interior and the several county courts of Oklahoma which approved the contract, should approve the instrument. The authority to remove restrictions of this character is a necessary complement of the government's power to impose them. The representation in such matters by the United States, acting through its designated authorities, is complete and exclusive. From every duty assumed by the federal government in dealing with its Indian wards there arises, even without express statutory authority, the duty of protecting its wards, and this protection necessarily goes with the governmental power. There is, however, ample ex-

press statutory authority for what was done in the instant case.

The Act of Congress of May 27, 1908 (35 Stat. 312), covers the points here discussed, particularly at sections 1, 2, 3, 6, 9 and 11. Said Act of May 27, 1908, was amended in important respects by the Act of April 12, 1926 (44 St. L. 239). In the amendment it is provided that any party to a suit where restricted Indians or their heirs are involved, may bring the United States into the suit as a party thereto, as was done in this case.

The Act of Congress of January 27, 1933 (47 St. L. 777), provides, amongst other things, that all funds and securities then held by or which might thereafter come under the supervision of the Secretary of the Interior, belonging to restricted Indians, should remain subject to the jurisdiction of the Secretary until April 26, 1956.

In these cited Acts of Congress full and precise authority is given to the government, acting through its designated approval agencies, to do that which was done in the matter of the approval of the Family Settlement Agreement.

This executive power exercised in Indian matters, has been always deemed a political one, not subject to be controlled by the judicial department of the government.

> —*Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 306.

The doctrine of *Heckman* v. *U. S.*, *supra*, 224 U. S. 413, 56 L. ed. 820, and the authorities there cited show that there was no policy involved in the matter of the making of said contract other than the policy of the United States Government with respect to its Indian wards, which does not permit any other authority whatsoever to operate within the field for the exercise of the government's policy toward its

wards. The whole matter of governmental guardianship of Indians lies within a special field well defined from time to time by Acts of Congress, and in this field the Secretary of the Interior is supreme, unless Congress provides otherwise. When the Secretary of the Interior decides a matter of this sort, in the absence of fraud, gross mistake of fact, or error of law (there are no such elements here involved), his decisions have complete finality. He, and he alone, passes judgment upon all matters of propriety—upon the questions as to whether or not a transaction is for the best interest of the restricted Indians involved, as to whether or not the consideration is ample, and as to whether or not the contract is subject to any unreasonable conditions. And when the Secretary decides, all questions of governmental policy towards Indian wards are forever determined, for the Secretary of the Interior has passed upon and adjudged the matter of policy. There is ample authority supporting this view, such as the case of *Lykins* v. *McGrath*, 184 U. S. 169, 46 L. ed. 483.

In *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 306, an opinion by the learned Justice WHITE, it was said:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

The thing called "governmental guardianship of restricted Indians" of course is not a guardianship within the ordinary meaning of the word. It means the policy of the United States in Indian matters, fixed always by Congress and exercised through the executive branch of the government, ordinarily by the Secretary of the Interior.

The voluminous argument about public policy is entire-

ly beside the point. However, there is nothing in the public policy of the State of Oklahoma contrary to that which was done here. The attack which the petitioners make upon this contract really comes to this: They say, in effect, that representatives of the government erred in the exercise of their powers—in their efforts to protect these full-blood Indians in their property rights; in other words, that the policy followed by these governmental officials was wrong. That policy lies upon a plane beyond the power of attack by the petitioners.

Petitioners erroneously overlook the rule that there is no question of policy involved with respect to the contract, other than the policy of the United States in the exercise of its exclusive governmental guardianship over these restricted Indians. They erroneously overlook the fact that all of the parties to the contract became owners in common of whatever interest the contracting parties had in the estate as of June 30, 1936, the date of the contract, and they erroneously and falsely assume that the contract contains provisions which owners in common could not make legally in the then circumstances. There are no provisions in the contract beyond the legal power of owners in common to provide by stipulation, for the protection of the common title.

The authorities cited by petitioners in support of their contention that the settlement agreement is against public policy are not in point—they are wholly inapplicable. There is nothing in the contract which even tends to invite suppression of evidence. There is nothing which contemplates or suggests the use of unlawful means. None of the cases cited by petitioners against the validity of the contract are in point. In each of the cases relied upon by petitioners the particular contract involved was sought to be enforced by a party thereto who was seeking to secure some benefit

under the contract. In each case the particular contract was secret; its existence was unknown to parties who might have been adversely affected by it. The particular contract involved in each case was the basis of the suit, and the defense of illegality was made by one of the parties thereto—a direct attack upon the contract by a party to it.

The evidence as to the manner in which the respondents performed their respective duties under the agreement is all to the effect that supression of evidence was never contemplated; that in fact all parties to the contract offered all available evidence, as required by the order of approval by the Secretary of the Interior. See testimony of Judge D. A. Richardson, Tr., pp. 8599, *et seq.*, and of N. A. Gibson, Tr. pp. 8603, *et seq.*

The findings of the trial court with respect to how the contract was performed were approved by the Circuit Court of Appeals in its decision in *Scott* v. *Beams,* 122 F. (2d) 777. See page 783 of the Circuit Court's opinion. In Vol. III of respondents' brief presented in the Circuit Court of Appeals this contract and all the contentions of the parties relating thereto are discussed fully commencing at page 218.

(3) ***Petitioners are foreclosed upon their claims of heirship by the tribal or town rolls of the Creek Nation, and by the final citizenship rolls made by the Commission to the Five Civilized Tribes, commonly known as the Dawes Commission.***

The findings of the Commission are conclusive upon all questions which relate to the right of enrolment and allotment of lands. The findings of the Commission, which appear upon the final enrollment records as descriptive of enrolled Creek citizens, such as the tribal town to which the citizen belonged, parentage, sex, and the like, are at least prima facie evidence of the facts found, and these findings are entitled to such great weight that they cannot be overcome, in the absence of clear, unambiguous and convincing countervailing evidence clearly establishing error or mistake.

—*U. S.* v. *Wildcat*, 244 U. S. 111, 61 L. ed. 1024;
Folk v. *United States* (8th Cir.), 233 Fed. 177;
United States v. *Mid-Continent Petroleum Corp.* (10th Cir.), 67 F. (2d) 37;
Halsell v. *Beartail*, 107 Okl. 103, 227 Pac. 392;
Cox v. *Colbert*, 135 Okl. 218, 275 Pac. 317.

Many other authorities are to the same effect.

The Creek tribe was a dependent nation which had the right of occupancy of the lands set aside to the tribe by the government. The nation maintained its separate government. The chief executive was the Principal Chief. The legislative body consisted of the House of Kings, somewhat like a State Senate, and the House of Warriors, patterned after a House of State Representatives. The members of the nation were divided into towns, usually forty-seven in number. These towns were constituted of groups who resided mainly in somewhat separate communities where their social life and political affairs centered. But the members of a given town were scattered, more or less,

throughout the whole nation. Each town elected its own Town King, who thereby became a member of the upper branch of the law-making body. The Town King made and had the custody of the roll of membership of the town. As members of the town died their names were stricken, and as new members were born their names were added to the tribal town roll. Government payments were made from time to time to the members of each town, the payments being based upon the town rolls. Usually the payments were made direct to the Town Kings, who in turn disbursed the payments to the members of the town whose names appeared on the town rolls. The final rolls were made by the Dawes Commission by authority of the Congress in course of winding up the affairs of the Nation and the allotment of the lands of the Nation to the citizens of the tribe.

In *United States* v. *Wildcat, supra,* this Court said:

> "* * * By the Act of Congress of June 10, 1896 (20 Stat. at L. 339, Chap. 398), the Commission to the Five Civilized Tribes, more commonly known as the Dawes Commission, was authorized to hear and determine applications for citizenship in any of the Five Civilized Tribes. By that act the rolls of citizenship of those tribes as they then existed were confirmed and the Commission commanded in determining applications for citizenship to 'give due force and effect to the rolls, usages, and customs of each of said nations or tribes.' It was provided by the Act of June 7, 1897 (30 Stat. at L. 84, chap. 3), that the term 'rolls of citizenship' should mean 'the last authenticated rolls of each tribe which have been approved by the council of the nations, and the descendants of those appearing on such rolls', and certain others specified who had been lawfully added to the rolls. By the Curtis Act of June 28, 1898 (30 Stat. at L. 495, 502, chap. 517), the Commission was authorized and directed to make correct rolls of the citizens by blood of the Creek Tribe,

eliminating from the tribal rolls such names as might have been placed thereon by fraud or without authority of law, enrolling such only as might have lawful right thereto, and their descendants born since such rolls were made. It was provided that the Commission should make such rolls descriptive of the persons thereon, so that they might be identified thereby, and the Commission was authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls, with the right of access to all rolls and records of the several tribes, and with authority to administer oaths, examine witnesses, and send for persons and papers. The rolls so made, when approved by the Secretary of the Interior, were to be final, and the persons whose names were found thereon, with their descendants thereafter born to them, with such persons as might intermarry according to tribal laws, were alone to constitute the several tribes which they represented. By Sec. 28 of the Creek Agreement of March 1, 1901 (31 Stat. at L. 861, 870, chap. 676), it was provided that all citizens who were living on the 1st day of April, 1899, entitled to be enrolled under the above provisions of the Curtis Act, should be placed upon the rolls to be made by the Dawes Commission under that act, and provision was made for allotment to the heirs where any such citizen had died since that time. 'The rolls so made by said Commission', the act continues, 'when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons.' This agreement was ratified by the Creek Council June 25, 1901 (32 Stat. at L. 1971).

"The legislation which we have outlined indicates the purpose of Congress to make provision for the partition of the lands belonging to the Creek Nation among the members of the tribe, and to that end it authorized the Dawes Commission to make investigation

> and determine the names of such as were entitled to be on the rolls of citizenship and to participate in the division of the tribal lands. This purpose, indicated in the Curtis Act of 1898, was emphasized by the so-called Creek Agreement of 1901, subsequently ratified by the tribe. In that act the Commission was authorized to investigate the subject, and its action, when approved by the Secretary of the Interior, was declared to be final. There was thus constituted a quasi judicial tribunal whose judgments within the limits of its jurisdiction were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress, by this legislation, evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal lands. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the Commission was established and endowed with authority to hear and determine the matter.'

The Creek tribal town rolls of 1890 and 1895 were made the basis for final enrolment. As to this, in *Folk* v. *United States, supra*, it was said:

> "The Creek Tribe made the Creek rolls of 1890 and 1895. By the Creek Agreement (31 Stat. 869, Sec. 28), which it made and ratified, the Creek Tribe contracted with the United States that the Dawes Commission should make the final roll of its citizens and allot them their lands, and that it should base that enrollment on the Creek tribal rolls of 1890 and 1895, and especially upon the latter."

In the course of determining whose name should appear upon the final citizenship rolls, the Dawes Commission made satisfactory investigation and heard evidence as to

(Brad

Residence:.....

Post Office: Bristow, Ind. Ter.

CREEK NATION. CREEK ROLL.

Dawes' Roll No.	Name	Relationship to Person First named.	AGE	SEX	TRIBAL ENROLLMENT				TRIBAL ENR		
					BLOOD	Year		No.	Name Of Father	Year	
5475	1. Brady, Albert		24	M	Full	1890	Hickory Ground	Page 123	Jackson Barnett	Dead	Hick Gro
5476	2. Brady, Dora	Dau	4 mos.	F	½		Hickory Ground		No. 1		Hick Gro

No. 1 on 1890 Roll as
No. 1 also on Hickory
1895.

Citiz'p Certif. issued March 6th, 1900

for Nos. 1 and 2 (N. B. for No. 2 No. 93)

(Brady's Exhibit No. 5.)

Card No. 1701

Field No. 1705

CREEK NATION. CREEK ROLL.

SEX	TRIBAL ENROLLMENT				TRIBAL ENROLLMENT OF PARENT					
	BLOOD	Year		No.	Name Of Father	Year		Name Of Mother	Year	
M	Full	1890	Hickory Ground	Page 123	Jackson Barnett	Dead	Hickory Ground	Sinda Sewell	1890	Hickory Ground
F	½		Hickory Ground		No. 1		Hickory Ground	Mary Brady		U. S. Citizen

No. 1 on 1890 Roll as Albert Soele
No. 1 also on Hickory Ground Town Census Roll of 1895.

(N. B. for No. 2 No. 93)

March 6th, 1900

Residence: Bryant

Post Office: ~~Seneca~~, Ind. Ter.

CREEK NATION. INDIAN ROLL

REEK NATION. INDIAN ROLL

Card No. 1419

Field No. 1423

Dawes' Roll No.		NAME	Relationship to Person first Named	AGE	SEX	BLOOD	TRIBAL ENROLLMENT Year	Town	~~No.~~ Page	Name of F
4524	1	Barnett, Jackson		48	M	Full	1890	Tuckabatchie	235	Siah Ba
	2									
	3									
	4									
	5									
	6									
	7							No. 1 on Tuckabatchee Pay R		
	8									
	9							ENROLLMENT		
	10							OF NOS.....4524.....HEREON		
	11							APPROVED BY THE SECRETARY OF INTERIOR		
	12							March 13, 1902		
	13	Citiz'p Cert.								
	14	issued	For No. 1 L							
	15	Jun 28 1902								
	16									
	17									
	18									

TRIBAL ENROLLMENT Year	Town	~~No.~~ Page	TRIBAL ENROLLMENT OF PARENTS Name of Father	Year	Town	Name of Mother	Year	Town
1890	Tuckabatchie	235	Siah Barnett	Dead	Tuckabatchee	Thlesothle	Dead	Tuckabatchee
			No. 1 on Tuckabatchee Pay Roll of 1895					
			ENROLLMENT					
			OF NOS.....4524.....HEREON					
			APPROVED BY THE SECRETARY OF INTERIOR					
			March 13, 1902					

Form No. A. 185

Jan'y 24th 1900

each person, not only as to the right to be enrolled, but as to description of every one of them, and in case of doubt sent out special investigators, known as field parties, to search for evidence to identify each person, and determine matters of description. See the testimony of Wm. O. Beall (Tr., p. 8372, *et seq.)*. The Town Kings and head men of each town testified before the Commission.

In the performance of its duties the Commission prepared the final enrolment record of the Jackson Barnett whose estate is here in controversy, and the final roll of Albert Brady, father of the petitioners Dora Brady and Lucinda Watashe, both of which rolls are here inserted opposite this page. It clearly appears from an examination of these records that the Jackson or Jackson Barnett through whom petitioners claim was a member of Hickory Ground Town and died before final enrolment, and that the true Jackson Barnett whose estate is here involved was a member of the Tuckabatchee Town and lived until 1934

Petitioners contend that the evidence shows there was no Jackson Barnett on the Hickory Ground Town roll. It is true that the full name Jackson Barnett did not appear on either the 1890 or 1895 roll of Hickory Ground, but it is shown that the name "Jackson" was there. Many Creek Indians had no family name and appeared on the town rolls without family name. For illustration, the true Jackson Barnett through whom respondents claim is enrolled as "Jackson" on the Tuckabatchee Town rolls until the roll of 1882, where his name appears as "Jack Barnett". That this custom was followed very generally in making the town rolls appears from the town rolls here introduced. This custom gives special force to the enrolment of a citizen as a member of a particular town. In this case the enrolment of the Jackson Barnett, through whom respond-

ents claim, as a member of the Tuckabatchee town, distinguishes him from other Jackson Barnetts who belonged to other towns.

In *United States* v. *Mid-Continent Petroleum Corporation, supra,* it was said:

> "Official records or documents kept or prepared by a person whose public duty it is to truly record the facts stated therein, are admissible as prima facie evidence of such facts. *Evanston* v. *Gunn,* 99 U. S. 660, 666, 25 L. ed. 306; *Runkle* v. *United States* (C. C. A. 10), 42 F. (2d) 804; *McInerney* v. *United States* (C. C. A.), 143 F. 729, 737; Wigmore on Evidence (2d Ed.), Vol. 3, Sec. 1639. The enrollment records made by the Dawes Commission were such records. They were made by members of a quasi-judicial tribunal created by Congress, whose duty it was to determine and truly record the facts therein set forth, and even as to collateral and incidental matters they are prima facie evidence of the facts stated therein. *Page* v. *Atkins,* 86 Okl. 290, 208 P. 807, 818; *Halsell* v. *Beartail,* 107 Okl. 103, 227 P. 392, Note 5.
>
> "The tribal rolls were also admissible. They were made by an officer of the Creek Nation whose duty it was to truly record the facts stated therein; and they are prima facie evidence of such facts. *Evanston* v. *Gunn, supra; Fowler* v. *Scott,* 64 Wis. 509, 25 N. W. 716; *Newman* v. *Doe,* 4 How. (Miss.) 522, 554, 555."

The parol evidence upon behalf of respondents abundantly supports the rolls. John A. Jacobs, who was called as a witness by parties other than respondents, testified (Tr., p. 2672) that he was Town King of the Tuckabatchee Town and a member of the House of Kings; that he was well acquainted with Jackson Barnett whose estate is involved in this controversy; that Jackson Barnett was a member of Tuckabatchee Town; that the witness helped

prepare the rolls for Tuckabatchee Town in connection with both the 1890 and the 1895 payments (Tr., p. 2674); that in preparing the rolls for the 1890 payment, he did the clerical work for George Alexander, who was Town King, and the work was done at Josh Asbury's; that the Town King of each town in the Creek Nation had charge of preparing the roll for his town; that in 1895 he had charge of preparing the roll by himself; that this roll was prepared at Jim Barnett's store; that Jim Barnett was a half-uncle of Jackson Barnett; that the roll prepared in connection with the 1895 payment was prepared by this witness from information furnished by the various members of Tuckabatchee Town, who were assembled at Jim Barnett's store on that occasion; that he placed Jackson Barnett's name on the roll himself, and that this witness saw Jim Barnett sign for Jackson Barnett on the 1895 roll as the uncle of Jackson Barnett (Tr., p. 2678).

(4) ***The manifestly false and absurd claims of petitioners, the improper methods by which the claims were presented, counsel's disregard of the enrolment records, the introduction of much wholly incredible oral evidence, together with other provoking circumstances, brought about the statements from the trial judge which are here criticised.***

Counsel for petitioners confuse the evidence introduced at the trial with the evidence heard after the trial when the affiants supporting the motion for new trial were cross-examined upon the subject-matter of their affidavits, and erroneously contend that the court exceeded its authority whilst passing upon the sufficiency of the affidavits to disqualify the judge. Amongst the witnesses cross-examined upon their said affidavits were the following:

The petitioner Dora Brady was questioned with re-

spect to the connection of Sim Liles with the case. The questions directed to her were solely for the purpose of testing her credibility as an affiant.

The affiant Sim Liles, who is not a lawyer, had charge of the litigation upon behalf of these petitioners. Inquiry was made of him to learn his interest in the outcome of the suit, and to ascertain what his course of conduct had been. He admitted that he was not a lawyer; that he had a percentage contract by which he is to receive part of the property if these petitioners win (Tr., p. 8631). He admitted that one Davis who helped to finance this group in the litigation likewise is to be one of the beneficiaries of the judgment, under a percentage contract, in the event this group wins. He admitted in effect that he had been at all times the promoter of the case; that he had advertised for Dora Brady and found her in the State of Nevada, and brought her to Sapulpa, Oklahoma, and had installed and kept her in his own home, and that she was still there—just the two of them—though Liles all the time had a wife who had withdrawn from the home and lived alone. His examination upon his affidavit in support of the petitioners' motion for new trial was in part as follows (Tr., pp. 8638, *et seq.):*

Q. "Do you pay Dora a salary there?

A. I give her room rent and furnish her her eats.

Q. You have been in charge of this litigation on the outside from the first, have you not?

A. I think so."

The appearance of Liles and his activity throughout the trial were so objectionable to the trial court as to cause some of the criticism to which objection is made.

R. C. Mason was another of the affiants who supported the motion for new trial by his affidavit. Commencing

at page 93 of their brief petitioners vigorously deny the right of the trial court to impugn the motives of Mason. The direct testimony of the affiant R. C. Mason, which was put on by counsel for this group at the hearing of the motion for new trial, is found in the record commencing at page 8675. His cross-examination commences at page 8687. Here it is shown that this affiant actively aided in procuring the affidavits supporting the Motion for New Trial. He admitted that he was a long time violator of the prohibition laws of the State of Kansas, and that he there corrupted and bribed officials to prevent the discharge of their duties; that he had pleaded guilty and was convicted in Kansas for corrupting and bribing public officers. He admitted other wrong-doings of serious nature, all shown upon his cross-examination.

Micco Behen, one of the affiants supporting this motion for new trial, admitted that he had been convicted and served a term in the penitentiary for theft.

The record shows unmistakably that Jackson Barnett was a near idiot and without sufficient intelligence to contract marriage. The District Court for the Southern District of California so held in *United States* v. *Barnett, et al.,* which decision was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, in the case of *Barnett* v. *United States,* 82 F. (2d) 765. Several other cases above cited, involving the estate of Jackson Barnett, are to the same effect. Many witnesses testified to the fact of Jackson Barnett's incompetency. Amongst them are the following:

John A. Jacobs (Tr., p. 2669, at p. 2680);
Lizzie Wyman (Tr., p. 2813, at p. 2828);
Mary Fields (Tr., pp. 2836, 2837, 2838);
Wm. McQueen (Tr., p. 3656, at p. 3858);

Eliza Grayson (Tr., p. 2852, at p. 2855);
Annie Beam (Tr., p. 3693, at p. 3696);
Wm. Fisher (Tr., p. 3718, at p. 3723);
Robert Bell (Tr., p. 4385, at p. 4392);
Timmie Randall (Tr., p. 5522);
Dr. W. C. Sanderson (Tr., p. 3687, at p. 3690);
George Riley Hall (Tr., p. 3981);
Ben Marshall (Tr., p. 1444).

Jackson Barnett had been known from his boyhood as "Crazy Jack". Notwithstanding the fact that he had been known as "Crazy Jack", notwithstanding the courts' decisions upon the question, and the weight of evidence here overwhelmingly showing that he had the well known characteristics of a crazy man, witnesses upon behalf of these petitioners testified in effect that he was an Indian of ordinary intelligence. Many of petitioners' witnesses testified to alleged conversations with Jackson Barnett of which he was wholly incapable, for want of enough intelligence to say the things attributed to him.

See the testimony of Wade Kilcrease (Tr., pp. 4744-4763). This witness was eager to testify to a marriage between Cinda and Jackson Barnett, but the Jackson Barnett who was Cinda's husband talked about everything in general, argued the scripture, discussed the preacher's sermon, methods of agriculture, farmed some, talked Creek as well as the witness, and was an intelligent Indian (Tr., p. 4759). This Jackson the witness had heard called Charles or Charley Barnett as often as he had heard him called Jackson Barnett (Tr., p. 4760). This Jackson firmly believed in baptism and not sprinkling. He testified at camp meetings what the Lord had done for him, and often, when the preacher failed to come, would fill the pulpit for him (Tr., pp. 4762-63).

Jackson Barnett's Town King testified to the crazy actions of Jackson Barnett and described him as having gone to a dance where he stood under a tree for two days, separate and apart from anybody, speaking to no one. When he was addressed by the salutation "How do you do, Jackson", his answer was "How do you do Jackson".

When the petitioners' case came on for hearing the judge was already so much disturbed by what appears to be perjury and subornation of perjury that he was thoroughly worn down and his patience exhausted. Perhaps no trial judge would have endured the situation without vigorous protest. We contend that he had a right to say everything that he did say. He had in mind the court decisions with respect to Jackson Barnett, including the California case cited *supra*, where it was affirmatively adjudged that Jackson Barnett had relatives through whom the respondents on the paternal side claim. See William Fisher's Exhibit #17, which consists of the record in the case of *Barnett* v. *United States*, 82 F. (2d) 765, upon appeal from the District Court of the United States for the Southern District of California to the Circuit Court of Appeals for the Ninth Circuit. The District Court's findings were in part as follows:

> "In the request to the Interior Department, Barnett was made to say that he had no living relatives or kindred. That statement is shown by the evidence in this case to be utterly untrue, for we have it established here that there are nephews and nieces, Creek Indians, the offspring of Jackson Barnett's brother David, all now living in Oklahoma. Jackson Barnett and David Barnett were duly enrolled through the work of the Dawes Commission which established the accredited list of the five Oklahoma tribes. No more space need be used in referring to the matter of that relationship. The enrollment list shows that both David and Jackson were

> the sons of Siah Barnett. David Barnett died a number of years ago, and the Indian Attorney Ward is also dead."

The David Barnett referred to in the above excerpt is the identical David Barnett through whom many of the respondents claim. The trial court's findings and judgment were in substance the same as the findings of the District Court of California.

We contend that it may be fairly said, as intimated by the trial court, that somebody did in fact "frame up" the pretended case of these petitioners, because the claims and the proceedings relating thereto do appear to bear all the insignia of frauds such as are too common in Indian cases. The judge was harassed by the fact that counsel for petitioners persisted in leading the witnesses upon the vital points, after the court had announced in the early stages of the trial and often thereafter that in such case counsel must not lead their witnesses upon the vital points. An examination of the record will make it entirely plain that counsel for these petitioners had his main difficulty with the court for undue persistence in leading the witnesses upon the most vital points, as in the case of the witness Robert Kelly, whose testimony is discussed here in petitioners' brief. The trial court could scarcely believe that counsel, experienced in Indian matters, could present in good faith the absurd and manifestly erroneous contentions of the petitioners. The evident complete want of any merit whatsoever in these claims should foreclose the petitioners from complaining about the trial court or the judge thereof.

The Circuit Court of Appeals, in its decision of this case, said:

> "* * * The record indicates that the attitude of certain attorneys was provocative at times, and the court was

justified in the belief that some of the testimony was fabricated. Still, we are not to be understood as approving all of the statements, comments and criticisms coming from the court, or the excess of interference with the attorneys in their examination of the witnesses. But there is no showing whatever that the complaining parties failed to introduce all of the evidence which was available to them. And we think the court reached the right conclusion in the end. Another long and expensive trial, without the incidents of which complaint is made, would in all probability conclude with like findings of fact and judgment. The ends of justice would therefore not be furthered with reasonable dispatch by ordering a retrial."

The claims of petitioners are more fully discussed in our brief filed in the United States Circuit Court of Appeals, Vol. II, commencing at pages 153 to 175.

(5) *The alleged disqualification of the trial judge.*

Upon the filing of an affidavit to disqualify the trial judge upon the ground of personal bias and prejudice, under the provisions of Sec. 21 of the Judicial Code (28 USCA, Sec. 25), it is the duty of the trial judge to pass upon the timeliness and legal sufficiency of such affidavit. If the affidavit is legally insufficient it is the duty of the trial judge to proceed.

The affidavits filed herein were not timely.

—*Swift* v. *Black Panther Oil & Gas Co.* (8th Cir.), 244 Fed. 20, 29;

Sec. 21 of the Judicial Code (28 USCA, Sec. 25);

Berger v. *U. S.*, 255 U. S. 22, 65 L. ed. 481;

Nations v. *U. S.* (8th Cir.), 14 F. (2d) 507;

Davis v. *Securities Commission* (7th Cir.), 109 F. (2d) 6;

Ex parte Amer. Steel Barrel Co., 230 U. S. 35, 57 L. ed. 1379;

Chafin v. *U. S.* (4th Cir), 5 F. (2d) 592;

Lipscomb v. *U. S.* (8th Cir.), 33 F. (2d) 33;

Bommarito v. *U. S.* (8th Cir.), 61 F (2d) 355;

Bowles v. *U. S.* (4th Cir.), 50 F. (2d) 848;

Shea v. *U. S.* (6th Cir.), 251 Fed. 433;

Duncan v. *U. S.* (9th Cir.), 48 F. (2d) 128;

Burrough of Hasbrouck v. *Agrios* (D. C.), 10 Fed. Sup. 371;

U. S. v. *Parker* (D. C.), 23 Fed. Sup. 880;

Bishop v. *U. S.* (8th Cir.), 16 F. (2d) 410.

The affidavits filed herein were insufficient as a matter of law. The alleged bias and prejudice is not of the kind or nature contemplated by the statute.

—*Benedict* v. *Seiberling* (D. C.), 17 F. (2d) 831, 836;

Berger v. *U. S.*, 255 U. S. 22, 65 L. ed. 481;

Parker v. *New England Oil Corp.* (D. C.), 13 F. (2d) 497, 498;

In re: Lisman (2d Cir.), 89 F. (2d) 898;

Ex parte Fairbank Co., 194 Fed. 978;

Anderson Coal Co. v. *Waban* (D. C.), 278 Fed. 945;

Amer. Brake Shoe & Fdry. Co. v. *Interborough Co.* (D. C.), 6 Fed. Sup. 215;

United States v. *Buck* (D. C.), 23 Fed. Sup. 508;

United States v. *Buck* (D. C.), 18 Fed. Sup. 827;

Saunders v. *Piggly Wiggly* (D. C.), 1 F. (2d) 582;

Minnesota & Ontario Paper Co. v. *Molyneaux* (8th Cir.), 70 F. (2d) 545;

Johnson v. *U. S.* (D. C.), 35 F. (2d) 355;

U. S. v. *Flegenheimer*, 14 Fed. Sup. 584.

The statements and acts of the trial judge with respect to the Family Settlement Agreement, including his conference with the Assistant United States Attorney, were in accord with strict propriety, and same do not evidence even the slightest bias or prejudice against the complaining parties.

—*Craven* v. *United States* (1st Cir.), 22 F. (2d) 605;
United States v. *Gilbert* (D. C.), 29 Fed. Sup. 507.

The certificates of counsel as to good faith were not in conformity with the statute.

—*United States* v. *Flegenheimer*, 14 Fed. Sup. 584;
Benedict v. *Seiberling*, 17 F. (2d) 831;
Saunders v. *Piggly Wiggly Corp.*, 1 F. (2d) 582;
Cuddy v. *Otis*, 33 F. (2d) 577.

It is erroneously assumed that the Family Settlement Agreement is against public policy, and that on account of the Family Contract the trial judge was biased in favor of the parties to the contract, and prejudiced against all other claimants.

—*Heckman* v. *United States*, 224 U. S. 431, 56 L. ed. 820;
United States v. *Mid-Continent Petroleum Corp.* (10th Cir.), 67 F. (2d) 37;
Caesar v. *Burgess* (10th Cir.), 103 F. (2d) 503;
Barnett v. *United States* (9th Cir.), 82 F. (2d) 765;
United States v. *Mott* (10th Cir.), 37 F. (2d) 860;
Barnett v. *Equitable Trust Co.* (2nd Cir.), 34 F. (2d) 916, 918;
Tiger v. *Western Investment Co.*, 221 U. S. 286, 55 L. ed. 738;
United States v. *Mott* (D. C.), 33 F. (2d) 340;
Barnett v. *Equitable Trust Co.*, 21 F. (2d) 325;

United States v. *Equitable Trust Co.*, 283 U. S. 738, 75 L. ed. 1379.

Perhaps the decision of the Circuit Court of Appeals in this case, reported as *Scott* v. *Beams*, 122 F. (2d) 777, 787, where the discussion of the affidavits to disqualify the presiding judge appears, is sufficient for the purposes of this answer brief.

Section 21 of the Judicial Code (28 USCA, Sec. 25) provides:

> "*Affidavit of Personal Bias or Prejudice of Judge.* Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. * * *"

It should be observed that the bias or prejudice for which a trial judge may be disqualified is *personal bias or prejudice against a party to the litigation or in favor of the opposite party to the suit.* There is not the slightest showing of any personal bias or prejudice against either of the petitioners or any other party to the suit.

In Vol. III of our brief filed in the Circuit Court of Appeals, commencing at page 177, we set forth fully all the material facts with reference to the affidavits which were offered in an effort to disqualify the trial judge, and the proceedings and rulings with respect thereto. We submit that the citations fully sustain each of our contentions.

Wherefore, Respondents most respectfully pray that the petition for writ of certiorari be dismissed or, in the alternative, denied.

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In the Supreme Court

of the United States

No. 906—October Term, 1941.

ROSA ALLEN, *ET AL.*, *Petitioners*,

VERSUS

ANNIE BEAMS, *ET AL.*, *Respondents*.

ANSWER BRIEF TO THE PETITION FOR WRIT OF CERTIORARI.

W. T. ANGLIN,
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In the Supreme Court of the United States.

No. 906—October Term, 1941.

ROSA ALLEN, *ET AL., Petitioners,*

vs.

ANNIE BEAMS, *ET AL., Respondents.*

ANSWER BRIEF TO THE PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices:

Statement.

This is a companion case to that of Dora Brady, *et al.*, No. 829, October Term, 1941, Joe Tiger, *et al.*, No. 846, same term, Charles Barnett, *et al.*, No. 847, same term, and Bennie Scott, No. 850, also this same term. In our answers heretofore filed in companion cases, involving the estate of Jackson Barnett, deceased, and all arising in one case, to-wit, *Scott* v. *Beams, et al.*, 122 F. (2d) 777, we have answered most of the matters presented in the petition of Rosa Allen, *et al.* We assume that all of these will be considered together.

Nature of the Claim of Rosa Allen, et al.

These petitioners claim that Jackson Barnett, deceased, was born in Tennessee in 1842, the son of James Barnett and Margaret Condry Barnett. They say that James Barnett was killed somewhere in Missouri, and that Margaret Condry Barnett died in Tennessee. Claimants did not establish, or even attempt to establish, any connection with the Jackson Barnett whose estate is here involved, by enrolment records of members of the Five Civilized Tribes, or by any documentary proof whatsoever. The enrolment records in evidence, supported by a vast array of parol, show that Siah Barnett was the father of Jackson, and that his mother was Thlesothle. Petitioners do not so much as contend that the father of Jackson Barnett through whom they claim was Siah, nor do they attempt to show that the mother of the Jackson Barnett through whom they claim was named Thlesothle. The enrolment records and the parol prove abundantly that Thlesothle was the mother of the genuine Jackson Barnett. The claims of the Rosa Allen group are fully discussed commencing at page 78, Vol. II, of our brief in the Circuit Court of Appeals, which has been filed as an exhibit to the Dora Brady petition.

Here, as in our other answers, we do not undertake to discuss the merits of any claim, except in so far as it appears necessary to show that writ of certiorari should not be granted. If petitioners' pretended case were here upon the merits, we should contend that their mere statement makes their claim too utterly absurd for any serious consideration.

Erroneous Statements of Fact in the Petition.

These petitioners grievously err, as in the case of Joe Tiger, *et al.*, by stating, in effect, that the Honorable

United States Circuit Court of Appeals for the Tenth Circuit, in *Scott* v. *Beams, et al.*, 122 F. (2d) 777, treated the Family Settlement Agreement, entered into only by respondents, as "implementing" the record upon which the decision was rendered. In this connection we deem it sufficient to refer to our answer to the petition of Joe Tiger, *et al.* (pp. 3-7), where we have shown that the instrument referred to in the decision of the Circuit Court of Appeals was entered into by all the parties to the appeal, including these petitioners. That stipulation relates to the inter-relationship of the respondents.

It is erroneously contended by petitioners, referring to the witness Rebecca Baker, that the Family Settlement Agreement operated to suppress part of the evidence of this witness. What petitioners really mean, we suppose, is that this witness first testified by deposition, and that afterwards in open court she changed her story in part. There was no suppression. In fact her deposition was filed and published in the case for the benefit of all parties to the suit, and for any and all proper purposes, including impeachment. We contend that it cannot be said that a published deposition, which is now part of the record, has been suppressed. If the Court should desire to see all the evidence of this witness, it may be found in the Transcript of Depositions, p. 10027, *et seq.*, 13220, *et seq.*, and in the record of the trial, p. 3886, *et seq.*

Respondents' answer to the charge that they or any of them suppressed any evidence may be found at pages 15-16 of their answer to the petition of Joe Tiger, *et al.* Also please see respondents' answer to the petition of Dora Brady, *et al.*, pp. 19-26. A more extended answer appears commencing at page 257, Vol. III, of our brief in the Circuit Court of Appeals.

The Controlling Question of Law.

The petition should be dismissed, or writ should be denied, under the rule announced in the leading case of *Forsyth* v. *Hammond,* 166 U. S. 506, 41 L. ed. 1095, 1098, where it was said, with reference to the authority of this Honorable Court to issue writ of certiorari:

> "* * * it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

Apparently there has been no departure from the rule announced in the above excerpt. It seems that since the decision in *Forsyth* v. *Hammond* this Court has followed consistently the same doctrine.

—*Carter* v. *Carter Coal Co.,* 298 U. S. 238, 56 S. C. 855, 80 L. ed. 1160;

Re: 620 Church St. Bldg. Corp., 299 U. S. 24, 57 S. C. 88, 81 L. ed. 16;

Anniston Mfg. Co. v. *Davis,* 301 U. S. 337, 57 S. C. 810, 81 L. ed. 1143;

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Federal Power Commission v. *Metro Edison Co.,* 304 U. S. 375, 58 S. C. 963, 82 L. ed. 1408.

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In the Supreme Court

of the United States

No. 846—October Term, 1941.

JOE H. TIGER, *ET AL., Petitioners,*

VERSUS

ANNIE BEAMS, *ET AL., Respondents.*

ANSWER BRIEF TO THE PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court of the United States

No. 846—October Term, 1941.

JOE H. TIGER, *ET AL., Petitioners,*

vs.

ANNIE BEAMS, *ET AL., Respondents.*

ANSWER BRIEF TO THE PETITION FOR WRIT OF CERTIORARI.

Statement.

This, Respondents' answer to the joint petition for writ of certiorari upon behalf of Joe H. Tiger, *et al.*, and Lucy Curns, *et al.*, No. 846, contains references to the petitions of Dora Brady, *et al.*, No. 829, Bennie Barnett Scott, No. 850, and Charles Barnett, Pelo Deere, *et al.*, No. 847—all companion cases.

Each of the three groups composed of Joe H. Tiger, *et al.*, Lucy Curns, *et al.*, and Charles Barnett, Pelo Deere, *et al.*, claim all the estate. Bennie Barnett Scott claims that he is the sole heir. If either should win, the others must lose.

The petition of Bennie Barnett Scott undertakes to adopt the petition of Dora Brady, *et al.*, and the joint petition of Joe H. Tiger, *et al.*, and Lucy Curns, *et al.* This

claimant was indicted in the United States Court at Muskogee, Oklahoma, under his true name, Bennie Scott, on account of his perjury in this case, was convicted, and his conviction was affirmed by the United States Circuit Court of Appeals for the Tenth Circuit, 115 F. (2d) 137. The record shows conclusively that his case is a pure fabrication. He here invokes the precise evidence for which he was convicted of perjury. We contend that he has not complied with the applicable rules, and that he has wholly failed to state any ground for issuance of writ of certiorari. We do not give any further attention to him.

The petitioners Charles Barnett, Pelo Deere, *et al.*, have not stated any ground for issuance of writ of certiorari, and have served upon respondents nothing other than their petition and seem to rely upon the showing made by the other petitioners. Hence we forego any further discussion of these petitioners.

Hereinafter our references to "petitioners" refer only to the groups Joe H. Tiger, *et al.*, and Lucy Curns, *et al.* We contend:

(1) That the petition should be dismissed or, in the alternative, the writ sought should be denied, for failure to comply with the rules of this Court, in that the petition does not sufficiently state the truth about the record and proceedings of the trial court. We respectfully submit that there are so many mis-statements of fact in the petition that it is impossible for this Honorable Court to determine therefrom the material facts which should be considered whilst passing upon the petition.

> (We do not know why these grievous mis-statements are made. We understand that our duty is limited to a presentation of the truth. Therefore, we do not judge opposing counsel. In the circumstances we can-

not forego acknowledgment that we are informed J. D. Simms, Esq., attorney for Joe H. Tiger, *et al.*, was unable to participate in the preparation of the petition. And perhaps due courtesy requires acknowledgment of the fact that the learned counsellor whose name first appears upon the petition is necessarily handicapped in that he has not had suitable opportunity to become familiar with the twelve thousand pages of the record.)

(2) Respondents further contend that the petition falls short of any showing that the proceedings fail "to reflect that calm deliberate consideration of the evidence, and that judicial impartiality, which are consonant with the principles of justice and due process of law."

We challenge the sufficiency of petitioners' proceedings in this Court.

Respondents have covered most of the subject-matter of this petition, both as to the facts and the law, in their separate response to the petition of Dora Brady and Lucinda Watashe, No. 829, to which response, for the sake of brevity and convenience, we here refer frequently in answer to the points in this petition which are not discussed herein. We beg leave to ask consideration of respondents' answer to the petition of Dora Brady and Lucinda Watashe before examination of this answer.

(We here attempt to avoid discussion of the merits, except incidentally and only in so far as it appears necessary to show that the writ should not issue.)

Mis-statements of fact upon behalf of petitioners, and their erroneous conclusions of law.

(1) Petitioners make many gross and misleading misstatements of fact with respect to the stipulation referred to by the Circuit Court of Appeals and described as implementing the evidence. As to this stipulation the deci-

sion of the Circuit Court of Appeals, 122 F. (2d) 782, recites:

> "* * * The trial proceedings and the depositions cover more than twelve thousand pages of typed record. And, in addition, *all parties to these appeals stipulated* that the members of Group I were related to each other and to Siah Barnett, as found and decreed by the court; that the members of Group II were related to each other and to 'Old Man' Conner who was the father of William Conner, Hannah Williams, Jennie Jeffrey, and Thomas Conner, through whom the members of the group claim relationship to the decedent, as found and decreed; and that the members of Group III were related to each other and to their ancestor Jim Lowe (Haryaryechee) in the manner set forth in the findings and decree. Even a resume of the evidence would extend this opinion beyond reasonable bounds, and it would not serve any useful purpose. There were many sharp inconsistencies and irreconcilable conflicts in the evidence, but they were for the determination of the trial court. It may be said in summary that a painstaking review of the voluminous record convinces us that, despite the quantum of countervailing evidence, the determinative findings of the court are adequately supported by substantial evidence, *implemented by the stipulation* referred to, and are not clearly erroneous, due regard being given to the opportunity of the trial court to judge of the credibility of the witness and the weight to be given to their testimony." (Italics ours.)

Note the finding that *all of the parties to the several appeals entered into the stipulation,* which of course included the petitioners here. This finding is true. For convenience of all the appellants in the Circuit Court of Appeals, and in order to shorten the record, this stipulation was made. J. D. Simms, Esquire, attorney for Joe Tiger, *et al.,* one of the petitioning groups, was authorized to prepare the record for all the appellants in the Circuit Court

of Appeals and lodge same there. Upon behalf of all the appellants he procured this stipulation, not knowing at that time whether or not the Circuit Court of Appeals would permit the use of the vast typewritten record, rather than a printed record.

Now the petitioners here say many times that the stipulation referred to in the above excerpt from the decision of the Circuit Court of Appeals was the family contract of settlement which was signed only by members of the three successful groups, the respondents here. Referring to the precise stipulation discussed by the Circuit Court of Appeals in the excerpt above, the petition at pages 14-15 states:

> "The Circuit Court found itself constrained to find it was bound by the findings of the trial court because there was support of substantial evidence, (1) *'implemented' by the agreement between the allies* and (2) giving opportunity of the trial court to judge the credibility of the witnesses and the weight to be given to their testimony. But (1) *the agreement had been approved by the Department of the Interior specifically on condition that it not be taken to implement the evidence of the Three Groups.* * * *" (Italics ours.)

The word "allies" appearing in the above excerpt plainly refers to the parties who entered into the Family Settlement Agreement. And it is expressly stated that the stipulation referred to by the Circuit Court of Appeals was approved by the Department of the Interior. It is perfectly evident that counsel who wrote the petition never read the decision of the Circuit Court of Appeals which recites that the stipulation in question was entered into by *all the appellants, including these petitioners.* And it is clear that the writer of the petition did not know that all of the parties to the appeal, as recited in the Circuit Court's opinion, had

signed a stipulation which did not relate in any manner whatsoever to the family contract, to which stipulation, and that only, reference was made by the Circuit Court of Appeals.

At page 3 of the petition it is stated that one of the questions for this Court's decision is:

> "Whether the contract between the three prevailing groups of claimants in which they stipulated that they are a family related to each other and to Jackson Barnett and agreed to share whatever spoils any group obtained in this action, is void and contrary to public policy, conducive to perjury and the suppression of evidence, and *improperly 'implemented'* the record in behalf of the Three Groups, patently influencing both courts below." (Italics ours.)

Here again it is clear that the writer of the petition confused the Family Settlement Agreement, entered into only by the prevailing groups, with the separate and later stipulation made upon behalf of all the parties to the appeal, after the appeal was lodged in the Circuit Court of Appeals.

At page 12 the petitioners say:

> "The Circuit Court of Appeals, faced with 'sharp inconsistencies and irreconcilable conflicts in the evidence' upheld the trial court on the ground that there was substantial evidence *'implemented by the stipulation'* to support the findings (122 F. (2d) 777, 782)." (Italics ours.)

At page 13 of the petition it is stated that the Circuit Court of Appeals erred "In holding that the findings are supported by substantial evidence *'implemented by the stipulation'* or agreement, and cannot be disturbed on appeal." (Italics ours.)

At page 17 of the petition the false statement is made that "The Circuit Court of Appeals specifically finds substantial evidence only when '*implemented by the stipulation*' sufficient to support the findings of the trial court." (Italics ours.)

The petition contains other mis-statements of fact to the same effect. Every reference to the Family Settlement Agreement as "implementing" the evidence constitutes a mis-statement of fact. To sum up on this point: The stipulation to which the Circuit Court of Appeals referred as implementing the evidence was the precise stipulation entered into by all the parties to the appeals, including the petitioners here, and including the respondents. But here we find the petitioners asserting that the implementing stipulation referred to in the decision of the Circuit Court of Appeals was the Family Settlement Agreement.

(2) At page 2 of the petition it is stated that the court approved the Family Settlement Agreement "prior to trial". At page 14 it is stated that the Assistant United States Attorney "persuaded the trial court to approve the contract * * *." On the same page it is said: "The trial court approved the contract in advance of hearing evidence * * *", and again, "the trial court having approved the contract * * *."

The record does not contain anything supporting these charges. Not until the trial upon the merits was concluded did the trial judge know who the parties to the Family Settlement Agreement were, or its terms. In fact, he declined to have anything to do with it until the matter came on in due course for hearing.

Commencing at page 10 of respondents' answer to the petition of Dora Brady, *et al.*, No. 829 in this Court—a companion case—we state the true facts about this matter.

Mr. Miller, Assistant United States District Attorney, upon examination by Mr. Pinson, counsel for the Lucy Curns group, testified in part as follows (Tr., p. 8532):

> "The Court: Now, Mr. Miller, didn't I tell you when you came in there that I wasn't going to have anything to do with that matter until it got to me as a judge?
>
> A. Yes, sir.
>
> The Court: And wouldn't express any opinion but that so far as I was concerned I wouldn't treat it as a matter of contempt?
>
> A. Yes, sir, that is true."

There is no evidence contradicting Mr. Miller.

The trial upon the merits closed June 23, 1938, with reservation for further hearing as to the Family Settlement Agreement. Commencing February 27, 1939, the evidence and argument was heard with reference to the Family Settlement Agreement, at which hearing the following colloquy occurred (Tr., p. 8508):

> "The Court: They asked whether I would take that as contempt in settling this case. I told them I wouldn't, but I wouldn't pass on it.
>
> Mr. Pinson: Your honor never saw this contract?
>
> The Court: No, I didn't know what it was. I never saw that contract until it was introduced in evidence.
>
> Mr. Pinson: And I doubt if you have studied it.
>
> The Court: I have never studied it. *I have never passed on the merits of the contract.*" (Italics ours.)

We have shown in respondents' answer to the petition of Dora Brady, *et al.*, No. 829, that trial judge requested the Circuit Court of Appeals to assign a judge to pass upon the Family Settlement Agreement, and that the Cir-

cuit Court of Appeals denied the request. The record shows abundantly that when the Assistant United States Attorney, at the request of the Attorney General, inquired of the trial judge prior to the trial as to whether or not approval of the contract by the Secretary of the Interior would be such invasion of the court's authority as to constitute contempt, the judge did not know who the parties to the family agreement were, nor the terms of the contract.

At page 10 of the petition the false charge is made that the United States District Attorney "made an *ex parte* presentation of the case of the Three Groups to the Court prior to hearing of evidence for any claimants."

At page 7 of the petition there appears the following false statement with respect to the trial judge:

> "Despite some protestations somewhat to the contrary, the trial court treated the departmental approval as a determination in favor of the Three Groups as the rightful heirs."

It is well known that the Secretary of the Interior has no authority to determine heirs of deceased allottees in the Creek Nation, or in any of the other four of the Five Civilized Tribes. There is nothing in the record to support the charge that the learned trial judge treated the Secretary's approval as a determination of the heirship in favor of the three contracting groups who made the family settlement agreement.

These statements quoted above constitute in effect a charge that the trial judge was wanting in judicial integrity. The assaults upon the trial court and the judge thereof are indefensible, scandalous and contemptuous. In this connection please see our discussion under the caption "The Trial Judge", at pages 14-15 of respondents' answer to the petition of Dora Brady, *et al.*, No. 829.

Other unfounded charges against the trial judge are hereinafter cited and discussed.

(3) *The charges made in the petition against Mr. Miller, Assistant United States District Attorney, and against Mr. Kingman, of the Federal Bureau of Investigation, are not supported by the record.*

At page 3 of the petition it is stated that the Assistant United States District Attorney participated as an active partisan "on behalf of the prevailing claimants in this private litigation *using in defiance of instructions his official position* to sponsor witnesses for the prevailing claimants and to intimidate all others with threats of grand jury prosecutions interfered with due process of law guaranteed by the Fifth Amendment to the Constitution of the United States." (Italics ours.)

At page 8506 of the record there appears in part the testimony of Mr. Miller, who says that he made a report of the case at great length to his superior, the Attorney General, and that he wrote the Attorney General fully about his attitude and conduct in the case, the objects to which his efforts were directed, and told the Attorney General the history of the case, in so far as the District Attorney's office was concerned. Then he added: "I don't think I got an answer to that letter. I just supposed that closed the matter, that it was satisfactory to him." With respect to his letter to the Attorney General, Mr. Miller answered: "I got no answer. If I write an explanation and you say nothing more, wouldn't you suppose that was a satisfactory explanation? That is the way I took it."

Mr. Miller's extended report with respect to his conduct in the case arose thus: Mr. Pinson, attorney for Lucy Curns, *et al.*, had written a letter to the Attorney General

complaining of Mr. Miller's conduct in the course of the proceedings, and the Miller letter to the Attorney General was in response to an inquiry from his said superior, the Attorney General. The Attorney General, having received and considered Mr. Miller's report, and having failed to respond to the Miller letter, carries the plain inference that Mr. Miller's conduct was satisfactory to the Attorney General.

We have shown in respondents' answer to the petition of Dora Brady, *et al.*, at pages 15, *et seq.*, that the course of conduct followed in the instant case is in accordance with the United States statutes with respect to the powers of governmental representatives in cases involving the property of restricted Indians.

The unfounded charge, cited above, to the effect that the Assistant United States District Attorney intimidated all witnesses other than those for the respondents "with threats of grand jury prosecution", is without support in the record. The truth about the matter is found in the uncontradicted testimony of Mr. Miller (Tr., pp. 8532-8535). The high points of the above cited testimony of Mr. Miller are as follows: Mr. Pinson was suggesting that newspaper publicity was given from the District Attorney's office that a grand jury would be called at the close of the trial, to investigate crimes committed during the course of the trial. Mr. Miller denied that the newspaper publicity originated in the District Attorney's office, and said "I know they didn't get it from me." (Tr., p. 8533). Upon cross examination of the witness Miller this question was asked:

> "Isn't it a fact the presiding judge said that he would not permit a criminal investigation during the progress of the case because some one would charge it would be an effort to coerce?"

to which the following answer was given:

"That was my understanding." (Tr., p. 8534.)

And then this question was asked and answered as follows:

"Mr. Richardson: Is it not also a fact the case was drawing to a close?

A. I think so. It was at one of the late hearings at Okmulgee, I think." (Tr., p. 8534.)

After discussion by the court and counsel of prior proceedings, and while Mr. Miller was still upon the witness stand, the hearing proceeded as follows (Tr., pp. 8534-35):

"The Court: And then I said that when this case —later on I would call this to the attention of the Department and recommend that investigation.

Mr. Pinson: But this was before that at Muskogee.

The Court: *It was my duty to do it when they admitted perjury.*

Mr. Pinson: *I agree with your honor.*

The Court: But I didn't think it ought to be held until the case was concluded. It might be proper if it is going to drag on to investigate it anyway.

Mr. Pinson: Yes, sir, and I think it would only be proper to be investigated by some one who is not concerned.

The Court: Well, the Department would handle that I am sure."

The trial judge did not call the grand jury, nor did he preside as judge when many of the parties to the litigation and numbers of their witnesses were indicted. Complaint is made in the petition that indictments were returned before final disposition of the case by the trial court. Apparently it has not occurred to counsel for the petitioners that the time limit for indictment as fixed by the statute

would have expired had the government delayed the investigation and indictments until final decision by the trial court. No indictments were returned until after the close of the trial.

At page 6 of the petition it is charged that Mr. Miller presented the Family Settlement Agreement to the trial judge prior to the trial. The record does not sustain this statement. The Family Settlement Agreement was never presented to the trial judge by anybody prior to the trial. It was first presented to the judge in open court at the trial, as we have shown above.

At page 14 is the charge that Mr. Miller, Assistant United States District Attorney, presented the Family Settlement Agreement to the trial judge prior to the trial, and persuaded the trial judge to approve the Family Settlement Agreement. Nothing of the sort occurred, as shown above.

At page 3 of the petition it is asserted that Mr. Kingman, of the Federal Bureau of Investigation, worked solely during the trial with the prevailing claimants *in the preparation of their witnesses against other claimants.* This is wholly false. There is nothing in the record to sustain the charge that Mr. Kingman worked with the prevailing claimants, respondents here, in preparation of their witnesses against other claimants, nor does anything of the kind appear. Mr. Kingman's testimony is in part as follows: That the Attorney General of the United States requested him to investigate the case (Tr. p., 4318); that his assignment was for the purpose of making investigation on behalf of the government, to find out what the real facts were (Tr., p. 4323). He further testified (Tr., pp. 8580-81) that he consulted with a lot of people, including his questioner Mr. Pinson, attorney for Lucy Curns, *et al.* Then the Court inquir-

ed, "Did you consult with him?", referring to Mr. Pinson. Mr. Pinson interrupted, saying: "Yes, sir, that is true after this thing came to a show-down I talked to Mr. Kingman for the first time." (Tr. p. 8580). Thereupon, during Mr. Pinson's examination of the witness Mr. Kingman, the following questions were put and answered (Tr., p. 8581):

Q. "But Mr. Kingman, isn't it a fact you never consulted with an attorney except for these three groups until after the evidence was all in, except maybe a few rebuttal witnesses?

A. Oh, yes, right in the very beginning, as early as the fall of 1936. You understand I don't know yet who you represent. It don't make any difference.

Q. I know that. I wish you wouldn't assume I am charging you with conspiring, because that is the last thing in mind.

A. I don't know who Howell Parks represents. I became acquainted with him.

* * * * * * *

The Court: The investigation you made was to ascertain the facts and not to help anybody?

A. That is right."

In support of this charge the fact is cited that one witness—only one—upon behalf of respondents testified against respondents by deposition, and afterwards in open court retracted her testimony. The record does not show the reason why she made the change. On the other hand, many witnesses for various other groups, including two of the most important witnesses upon behalf of Joe H. Tiger, *et al.*, returned to the witness stand at the trial and retracted the evidence which they had given in court in support of Joe Tiger, *et al.*, and gave detailed explanation for the retraction of their first testimony. These two witnesses claimed that

an agent of Joe Tiger, *et al.*, had fraudulently induced them to testify falsely in the first instance. The conduct of two members of the Joe Tiger group, namely, Joe Tiger himself and Peter Hamilton, and of their said agent, resulted in the return of indictments against Joe Tiger and Peter Hamilton for prejury, and also an indictment against their said agent. We do not claim that these indictments which are referred to in this petition are proof of guilt, but we do claim they at least tend to show that Mr. Kingman, agent of the Federal Bureau of Investigation, was not working to assist the respondents, as asserted in the petition, but for the purpose of protecting the court from perjury. The record does not contain anywhere any matter whatsoever reflecting or tending to reflect upon counsel for the respondents, or upon any witness for respondents, except in the case of the one Indian above referred to, who changed her story for reasons not apparent in the record. A full discussion of the Family Settlement Agreement is found in respondents' brief, Vol. III, commencing at p. 218, which brief was presented as part of an appendix offered in support of the petition of Dora Brady, *et al.*

(4) *The charge that counsel for respondents entered into a conspiracy and suppressed evidence is false and without any support in the record.*

At pages 13-14 of the petition it is stated that the lawyers for the parties to the Family Settlement Agreement "conspired together", and that "Evidence challenging the claims of the others is suppressed". There is nothing in the Family Settlement Agreement (Conner's Exhibit #73) to support this charge. On the other hand, the agreement was approved subject to the condition that all the evidence available to the parties to the agreement should be fully and fairly presented to the court. Counsel for respondents com-

plied with this requirement. Both the trial court and the Circuit Court of Appeals made findings to the effect that there is nothing whatsoever in the evidence to sustain this charge. See:

> Findings of the trial court, Clk. Tr. Vol. II, pp. 1132-1171;
>
> Findings of the Circuit Court of Appeals upon the point, *Scott* v. *Beams*, 122 F. (2d) 785, 786.

For the uncontradicted evidence sustaining these findings see testimony of D. A. Richardson (R. 8590, *et seq.*), and N. A. Gibson (R. 8603, *et seq.*).

The court inquired of Mr. Pinson, attorney for the Lucy Curns group, as to whether or not he claimed any evidence was suppressed that would help either of the two groups here constituting the petitions. To this question Mr. Pinson answered, "I don't know, Your Honor." (R. 8514). And it was this same Mr. Pinson who attempted to become a party to the alleged conspiracy. When the hearing was had upon the settlement agreement, this question was put: "Mr. Pinson *didn't you try* to get the parties to the contract to take you in?", to which he gave the answer, "*I did*". (R. 8623).

Thus we find counsel for the Curns group in an impossible situation. He cannot vindicate himself by claiming want of knowledge of the terms of the instrument. He fought to prevent the Secretary of the Interior from approving the instrument on account of its terms.

(5) *The claims of Lucy Curns, et al., are manifestly groundless and false upon their own showing. They could not recover if they were without opposition.*

These petitioners contend that Andrew Sullivan, a Creek Freedman, was the husband of Thlesothle, a full-

blood Creek Indian of Tuckabatche Town; that of this union were born Tecumseh Andrews and Jackson Barnett. That after Thlesothle's death Andrew Sullivan married another woman, Patsy Barnett, and that of this union was born Rebecca, the mother of these petitioners. Whatever claim they have, therefore, to this estate is by virtue of the blood of the alleged father Andrew Sullivan.

The evidence wholly fails to disclose any proof of any kind whatsoever, either hearsay or otherwise, that Andrew Sullivan was ever married to Thlesothle, or that he ever cohabited with her at any time. The records of the Dawes Commission show that Andrew Sullivan was a slave of William Sullivan. It therefore follows that he was incapable of contracting marriage with the Indian woman Thlesothle. The Oklahoma law applicable to such a state of facts is found in *Estate of McDade,* 95 Okl. 120, 218 Pac. 532. Had such marriage occurred it would have been absolutely void, and the paternal line of such pretended marriage would have been incapable of inheritance. This we have shown in Vol. II, page 140, of respondents' brief presented and filed in the Supreme Court as an appendix to the petition of Dora Brady, *et al.*

The Dawes Commission was required to make separate rolls of negro members of the tribe who were the slaves or descendants of slaves of Creek Indians. Indians, whether of the full blood or mixed blood, were enrolled upon the final citizenship rolls as Indians. The Acts of Congress requiring the enrolment of negroes separate from the Indians are found and discussed in *Nunn* v. *Hazelrigg* (8th Cir.), 216 Fed. 330, where it is said:

> "The Dawes Commission thus created and existing was a quasi judicial body. *Kimberlin* v. *Commission of Five Civilized Tribes*, 104 Fed. 653, 44 C. C.

A. 109. It was expressly required to make separate rolls of the Indians and freedmen. To be enrolled as a Creek Indian, it was not sufficient for an applicant to show that he was an Indian, but he must show, and the commission must find, that he was an Indian of the Creek Tribe; and to be enrolled as a freedman it was not sufficient to show that he was an African, but he must show, and the commission must find, that he was a former slave or the descendant of a former slave of some member of the Creek Tribe, or at least a slave of some other person adopted by the Creek Nation."

Shortly after the close of the Civil War, on June 14, 1866, the United States entered into a treaty with the Creek Nation whereby their former slaves and descendants of their slaves acquired all the rights and privileges of the Indian citizens of the tribe.

Note, if the Court please, that *Nunn* v. *Hazelrigg, supra,* cites *Hegler* v. *Faulkner,* 153 U. S. 109, 38 L. ed. 653, which is strongly relied upon by petitioners, and distinguishes that case from the many reported cases relating to the Five Civilized Tribes, such as *Kimberlin* v. *Commission of Five Civilized Tribes,* 104 Fed. 653, 44 C. C. A. 109. The case of *Hegler* v. *Faulkner* involved a member of a primitive tribe of Indians, with whom the government dealt specially and in an entirely different manner from that employed in dealing with members of the Five Civilized Tribes. Commencing at page 27 of respondents' answer to the petition of Dora Brady, *et al.,* No. 829, we have discussed the force and effect of the records of the Five Civilized Tribes, and there cited authorities.

Both of the petitioning groups here, who are negroes, presented their claims without recognizing the force and effect of the enrolment records, and by this course of conduct, together with other matters of record, provoked the

trial court and brought about the criticised remarks made by him. The claims of Lucy Curns, *et al.*, are wholly unsupported by any enrolment record. The parol proof offered was so clearly incredible that the patience of the trial judge was exhausted. The real complaint of petitioners is because of the consideration he gave to the enrolment records.

At page 140, *et seq.*, Vol. II, of our answer brief first filed in the Circuit Court of Appeals, we have discussed fully the Curns-Gentry claims.

(6) *The claims of Joe H. Tiger, et al., are without any merit. The claims now made are inconsistent with their own admissions at the trial.*

The contentions of this negro group, all of them full-blood negroes except only one of mixed blood, are very similar to those of the Curns group discussed *supra.* At the trial they admitted that they claimed only on the maternal side, through Thlesothle, admittedly a full-blood Indian. They failed to identify the alleged Thlesothle through whom they claim as the identical Thlesothle who was the first wife of Siah Barnett. Instead of showing connection with Thlesothle, the first wife of Siah Barnett, they were shown to be relatives of an entirely different woman with a similar name, commonly called Lizzie, and also called Timohechee. In order to show connection with Jackson Barnett they had to establish the claimed relationship of Petille and Sarfulley to Thlesothle, Jackson Barnett's mother. There is not any record of the Commission to the Five Civilized Tribes showing any such relationship. Now they assert claims on the paternal side.

Mr. Patterson in the main conducted the trial upon behalf of this group. At page 1309 of the record the following appears:

"Mr. Patterson: If the court please, I don't believe your honor caught it. This is not a contest as to the Siah Barnett side. If we come in at all we come in through the mother of Jackson Barnett. There is no dispute on that.

Mr. Anglin: In other words, you don't question our allegations as to the father of Jackson Barnett?

Mr. Patterson: We are not offering any evidence on that."

These petitioners failed to recognize the force and effect of the tribal and final rolls of the Creek Nation. The final rolls of Creek Indian citizens show that all the children of Siah Barnett, the father of Jackson Barnett, whose estate is here involved were full-blood Indians, and they are enrolled as such. The failure of this group to impeach the enrolment records by the incredible testimony of their witnesses impressed the trial judge unfavorably. In Vol. II of our said brief exhibited here by Dora Brady, *et al.*, we have discussed the claims of Joe H. Tiger, *et al.*, citing the record and authorities.

The respondents proceeded in a manner entirely different from these petitioners. We introduced a great array of documentary proof and many unimpeached witnesses. An abstract of these exhibits and of the testimony of the witnesses upon behalf of respondents may be found under the caption "THE CLEAR WEIGHT OF THE EVIDENCE DOCUMENTARY AND ORAL, SUSTAINS THE FINDINGS OF THE TRIAL COURT IN FAVOR OF THE APPELLEES AND AGAINST ALL OTHER CLAIMANTS," commencing at page 16, Vol. 1 of respondents' brief filed in the Circuit Court of Appeals, which has been presented here as shown above.

The trial court considered the claims presented by these two groups of petitioners as too flagrant for tolerance.

(7) ***We submit that whilst considering the charge of prejudice on the part of the trial judge the proceedings prior to the presentation of the claims of these two groups should be borne in mind, and that the learning and experience of the trial judge in such cases should be considered.***

We know of no reported case in America where perjurers appeared in such great number. Many of the groups presented purely pretended and fabricated cases. It is the duty of every trial judge to protect his court against frauds, and particularly against perjury. In the circumstances the criticised remarks of the trial judge were unavoidable. He knows the attorneys who presented the case. He personally knew many of the witnesses. We believe that he has presided as judge in more Indian cases than any other living judge.

Under the caption "THE TRIAL JUDGE" in our answer to the petition of Dora Brady, *et al.*, we have outlined in brief the great and honored career of the able and fair minded trial judge whose judicial integrity is here under attack. We believe we can fairly state it is matter of common knowledge that his career has not been surpassed in the State of Oklahoma—first, as Chief Justice of the Supreme Court of the state, then Governor for four years, long-time United States District Judge for the Eastern District of Oklahoma, and now Circuit Judge of the Court of Appeals for the Tenth Circuit. Now in honorable retirement, he was assigned to preside at the trial of this case because of his peculiar qualifications in such matters.

The Circuit Court of Appeals for the Tenth Circuit has made special references in its decisions to the long experience and ability of the trial judge, Hon. R. L. Williams. One of these cases is that of *Youngblood* v. *Magnolia Petroleum Co.*, 35 F. (2d) 578, where it was said:

"The trial court has had unusual experience with Indians, and long experience in dealing with oral evidence, and of observing the effect of large sums of money upon the memory of things long past. Even in an equity case, the judgment of an appellate court, confronted with the record, should not lightly displace the judgment of the trial court, who has had the advantage of observing the witnesses upon the stand.

* * * * * * *

"The questions of the trial court disclosed nothing but an effort to get at the facts. Futhermore, the record shows that the trial of the case was concluded on January 31, 1928, and was thereafter briefed by both sides; the trial court considered these briefs until the 18th day of the following October, when he decided the case."

In this connection we beg to refer to the fact that in the instant case Judge Williams considered the matter for an unusually long time after the trial had closed, and made his findings and conclusions at such great length as to show that he had carefully and fairly weighed and considered the record in its entirety.

(8) ***The Negro claimants were not deprived of a hearing in accordance with due process of law guaranteed by the Fifth Amendment to the Constitution.***

The trial proceedings do not fail "To reflect that calm and deliberate consideration of the evidence, and that judicial impartiality which are consonant with the principles of justice and due process of law."

The alleged facts cited in the petition for the purpose of showing prejudice against Negroes do not sustain the charge.

It will be remembered that prior to the trial, upon behalf of the Attorney General, Mr. Miller inquired of the judge as to whether or not the contemplated approval of

the Family Settlement Agreement would be such an invasion of the judicial power as to constitute contempt. It is charged that the judge commented upon the situation presented by Mr. Miller to the effect that if full-blood Indians made a joint effort to defeat the claims of negroes and other non-citizen claimants, probably the contract would not be against public policy. We have shown above, citing the record, that the only thing the judge said to Mr. Miller was to the effect that he would not consider approval of the settlement agreement as contempt of court. The judge himself so declares, and he is supported by Mr. Miller, who when recalled as a witness, testified as follows (R. 8532):

> "The Court: Now, Mr. Miller, didn't I tell you when you came in there that I wasn't going to have anything to do with that matter until it got to me as a judge?
>
> A. Yes, sir.
>
> The Court: And wouldn't express any opinion but that so far as I was concerned I wouldn't treat it as a matter of contempt?
>
> A. Yes, sir, that is true."
>
> (We have quoted this above, and here quote again, for convenience of the Court and for sake of emphasis.)

But had the trial judge made the statement attributed to him, the same would be of no importance here. Already it fully appeared from the depositions that the alleged negro wife and her alleged son by Jackson Barnett, the so-called Bertha Barnett and Henry Barnett, were impostors, and that they had been presenting, by depositions, a wholly fabricated claim. (Any and all references then made to negro claimants could have been only with respect to these pretenders, who were later joined by the impostor Mayetta Kingston. They could not have related to the negro petition-

ers here, because they had not introduced any evidence in support of their several claims.) These depositions had already been opened and published. Had the judge commented with respect to these false claims, he must have had information either from the United States District Attorney's office or from the depositions already of record. Doubtless the judge was already advised that request had been made to the Attorney General for a special investigation of these claims. If Mr. Miller, the Assistant District Attorney, at that time advised the trial judge of the false claims of this negro group, his acts were altogether proper, for a district attorney may always advise with the trial judge with respect to criminal matters. This is true even when criminal cases are being heard. Please see:

Cravens v. *United States* (1st Cir.) 22 F. (2d) 605;
United States v. *Gilbert* (D. C.), 29 Fed. Sup. 507.

The Circuit Court of Appeals held that the false claims of this group, composed of the alleged Bertha Barnett, Henry Barnett, and Mayetta Kingston, constituted one of the major factors which induced the parties to enter into the Family Settlement Agreement. 122 F. (2d) 786. These false claimants, known as the Bertha Group, placed their main reliance in the great and perhaps unprecedented number of their witnesses. Perjurers in great crowds testified for the Bertha Group. A large part of the record consists of the testimony upon behalf of this group.

These petitioners have no proper interest in what may have occurred with respect to Bertha, the pretended wife of Jackson Barnett, and her pretended children by Jackson Barnett. Both Bertha and Mayetta finally admitted facts constituting perjury. We submit that the petitioners have no reason to complain of whatever may have

been said with respect to the wicked perjured Bertha Group. Bertha, Henry and Mayetta were indicted for their crimes in this case, and they are amongst the parties whose indictment is referred to and protested in the petition.

The next instance mentioned in support of the charge of prejudice appears in the petition at pages 8 and 9, where it is claimed that the trial court persistently throughout the trial evidenced bias against all claimants and witnesses other than those for the Three Groups, especially persons of negro blood. And it is said in the petition, with respect to the trial judge, that he "added in substance that *he should not be expected to believe the statements of negro claimants.*" (Italics are petitioners'.) This charge is utterly untrue. The judge did not make any such statement as that attributed to him. What he really said occurred during the examination of Lucy Curns, one of the petitioners. She admitted that her father was a negro (Tr., p. 4075), and that her mother was a negro (Tr., p. 4086). The enrolment record showed that her maternal grandfather was a negro. From the evidence, her own admissions and personal appearance, the court found that she was a negro. She was, by her own admission, enrolled as a Creek Freedman (Tr., p. 4070), and was on the Dunn Negro Roll (Tr., p. 4071). She testified that she was a member of the Indian Tuckabatchee Town, where negroes could not be enrolled. Considering all these matters, and giving due force and effect to the enrolment records, the trial judge stated: "When she swears Jackson Barnett was her uncle and the proof shows he was Indian and the record shows they are negroes, how can you expect me to believe her evidence?" (Tr., p. 4088). This is the statement to which petitioners refer. The trial judge did not say, even in substance, that he would not believe negroes. His statement was merely an

inquiry as to how it could be expected that he, the judge, could believe the witness's evidence, which was in plain conflict with her own admissions and the enrolment records. He was merely inquiring how it could be expected that he, the trial judge could believe that the witness, a full-blood negro, was the niece of Jackson Barnett, a full-blood Indian.

In support of the claim of prejudice the petition quotes the statement of the trial judge, "I always let them put that stuff in and not pay attention." (Tr., p. 4077). This statement was made with reference to certain hearsay testimony by the witness Lucy Curns as to what had been told her by her deceased grandfather. The court permitted its introduction, over objection, with the above remark. We are unable to distinguish this comment by the trial court from that of the great Lord ROMILLY who said, with respect to this class of evidence, that he never had any difficulty in disregarding it. *Crouch* v. *Hooper*, 16 Beaven, 182.

The court was justified in disregarding this hearsay evidence, because the rolls, both Freedmen and Indian, were before him, and the admissions of the witnesses were before him. We admit that this class of hearsay evidence is admissible where it is impossible to produce other and better evidence, and it is admissible in support of documentary evidence, to clarify a situation. *But it is valueless to impeach the solemn judgments of the Dawes Commission, a quasi judicial tribunal.* The trial judge was protesting the vain efforts made by the petitioners to impeach the judgments of the Dawes Commission by this particular unreliable class of evidence.

The further claim is made that the court harassed attorneys for the claimants other than the three groups, interfering with the direct examination of the witnesses. The

judge criticized only when counsel made intolerably wide departures from the manifest truth supported by the documentary evidence, and from the well known applicable law governing such matters.

The foregoing constitute the whole of the charges of prejudice. The petitioners apparently do not so much as make any effort to show *personal* prejudice against *any party* to the litigation, and it is only personal prejudice against a litigant that may be invoked in support of a charge of prejudice. There is complete failure of any showing that the judge had a personal bias in favor of respondents or personal prejudice against the petitioners. In support of our contention that the alleged bias and prejudice is not of the kind or nature such as to cause a reversal of the case, please see Vol. III, p. 187, *et seq.*, of our brief filed in the Circuit Court of Appeals, which is part of an appendix attached to the petition of Dora Brady, *et al.* See also Sec. 21 of the Judicial Code, 28 USCA, Sec. 25.

Wherefore, Respondents respectfully pray that the petitions be dismissed or, in the alternative, that writ of certiorari be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 829

DORA BRADY ET AL., PETITIONERS

v.

ANNIE BEAMS ET AL.

No. 846

JOE TIGER ET AL., PETITIONERS

v.

ANNIE BEAMS ET AL.

No. 847

CHARLES BARNETT ET AL., PETITIONERS

v.

SUSIE CONNOR ET AL.

No. 850

BENNIE BARNETT SCOTT, PETITIONER

v.

ANNIE BEAMS ET AL.

No. 906

ROSA ALLEN ET AL., PETITIONERS

v.

ANNIE BEAMS ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

444668—42

These five petitions for writs of certiorari, each of which is filed by a separate claimant or group of claimants, seek to review a decision of the Circuit Court of Appeals for the Tenth Circuit (*Scott* v. *Beams*, 122 F. (2d) 777), which held that the respondents are entitled to inherit the estate of Jackson Barnett. It is the purpose of this memorandum to state the position of the United States with respect to this litigation.

Jackson Barnett was a full-blood Creek Indian. Oil was discovered upon his allotted lands and the royalties therefrom produced a large fund which at the time of his death in 1934 was held in trust by the Secretary of the Interior. Shortly after Barnett's death a group of persons claiming to be his heirs initiated proceedings for the appointment of an administrator in the County Court of Muskogee County, Oklahoma. Subsequently, other claimants brought actions to establish their right to inherit. One such action was begun in the District Court of Muskogee County, Oklahoma, and another in the District Court of McIntosh County, Oklahoma. Notice of pendency of each of these three proceedings was served upon the Superintendent of the Five Civilized Tribes, pursuant to Section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239. Thereupon the United States pursuant to the same Act intervened and caused the proceedings to be removed to the United States District Court for the Eastern District of Oklahoma.

After removal the three actions were consolidated at the suggestion of the United States.

The intervening petitions filed by the United States took no position with respect to who were the heirs of Barnett.[1] The petitions prayed that the court require the various claimants to establish their rights by strict proof, that the court determine all other matters involved in the litigation, and that the rights of the United States as guardian of any restricted wards who might be adjudged to be the heirs of Barnett be protected.

The United States has continued to occupy an impartial position throughout the proceedings. Accordingly, it neither joins in nor opposes the petitions for writs of certiorari.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

FEBRUARY 1942.

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[1] The intervening petitions of the United States did allege that the decree in *Barnett* v. *United States*, 82 F. (2d) 765 (C. C. A. 9), certiorari denied, 299 U. S. 546, annulling the purported marriage of Anna Laura Lowe to Barnett was *res judicata* of her claim to share in his estate. See also *Mott* v. *United States*, 283 U. S. 747; *McGugin* v. *United States*, 109 F. (2d) 94 (C. C. A. 10). The district court upheld this contention and she did not appeal.

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